

2492  
No. 11707

see vols. 2491-2493  
United States

# Circuit Court of Appeals

For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

and

A. J. GOERIG and CLYDE PHILP,  
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,  
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

## Transcript of Record

In Five Volumes

VOLUME II

Pages 469 to 948

Upon Appeals from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

FILED  
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(Testimony of Patrick L. Darcy.)

Q. Will you tell me whether or not Mr. Schaefer was superintendent on this job?

A. He was, as general superintendent over all operations.

Q. May I have the payrolls again, 16, please? And what would that time be?

A. Well, he was general superintendent over all operations for the entire period of that job.

Q. Was he there at this job for a time as superintendent of the job, or not?

A. He was there off and on quite a bit of the time during the job.

Q. Was he there as superintendent of this job, Mr. Darcy, or not?

A. Not directly as solely superintendent of that job alone.

Q. As superintendent, sir?

A. Not as of that job alone.

The Court: Who is this we're talking about now?

A. I imagine it is William E. Schaefer.

Mr. Holman: William E. Schaefer, the brother.

The Court: The brother of the plaintiff.

Q. Now, is it not a fact that Mr. Schaefer was there as superintendent on the weeks—would you take this payroll, [474] please, and check it—and so charged on the payroll for the week of July 27 to August 2?

Mr. Olson: Your Honor, that's prior to Mr. Darcy becoming superintendent.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Well, I asked him whether he either succeeded him or followed him.

Mr. Olson: I thought you asked if he succeeded him.

The Court: What is this date?

Mr. Holman: The week of July 27 to August 2.

The Court: What year?

Mr. Holman: '44, your Honor.

A. Commencing July 27?

Q. Yes, sir, that week, doesn't it show W. E. Schaefer as superintendent at \$100.00 a week?

A. Not that I can find.

Mr. Olson: Do you know anything about it, Mr. Darcy, except what shows on that payroll, prior to the time you became superintendent?

A. Nothing. The bookkeeping is not my business.

Mr. Olson: I don't think it is a proper question, then, your Honor, to ask Mr. Darcy. It is relating to a period of time prior to his becoming superintendent, and Mr. Darcy wouldn't necessarily know; he says he doesn't.

Q. Pardon me; Mr. Darcy, who was superintendent when you were [475] there as a carpenter?

A. To my knowledge and instructions it was Fred Waltie.

Q. Fred Waltie was your superior?

A. I was given to understand that he was my superior at the time of which you speak; that he was in entire charge of the job.

Q. Then is it not a fact that he was succeeded by Schaefer as your superior on the job?

(Testimony of Patrick L. Darcy.)

A. No; when he took off Schaefer is the one that put me in in Waltie's place.

The Court: Pardon?

A. When Mr. Waltie elected to leave Mr. Schaefer installed me in Waltie's place.

Q. And Mr. Schaefer did not intermediately serve, himself, at all?

A. He was there on the operation.

Q. Well, when do you say that you started as superintendent?

A. The 10th of August, 1944.

Q. And you say that Mr. Schaefer did not replace you as superintendent on this job for the week of August 17 to August 23?

A. No; he was there and worked in conjunction with me, over me.

Mr. Holman: These are rather difficult for the witness to pick up readily, your Honor, and I would like [476] to have him during the recess check and make sure that he is answering me correctly, because they're not only thin paper, your Honor, but they're hard to see.

The Court: Well, I fail to see how the payrolls would help him unless he had something to do with the making of them, in a supervisory capacity or directly.

Q. Doesn't the superintendent on the job furnish the office the hours of employees, from which the payroll is made up?      A. That I did.

Q. Yes, sir. Then you could tell me, could you not, whether after you went on the job you furnished William Schaefer's name as superintendent?

(Testimony of Patrick L. Darcy.)

A. I did not turn him in as a superintendent. I merely turned him in as being on the job.

Q. And did not classify him? A. No.

Q. Were you informed that he was superintendent for those weeks?

A. I was informed from long before that that he was general superintendent over all operations.

Q. Were you informed that he was superintendent on this job for the weeks I indicated to you, and charged to this job as such? A. No.

Q. You did not know that, sir? [477]

A. No.

Q. If that is shown to be a fact. All right; now then, is it not a fact that for the week of August 10 to August 16 there was no superintendent charged at all?

A. I wouldn't know; I didn't do that work in the office.

Q. You were there that week, were you not?

A. I was on the job, yes.

Q. But you were not superintendent, were you?

A. I was given to understand that that was my capacity.

Q. Did you act as superintendent at that time?

A. I did.

Q. All right, sir. Now, then, is it or is it not a fact that in September Mr. William E. Schaefer again went back on the job as superintendent? I am referring to the week of August 31 to September 6. A. No.

(Testimony of Patrick L. Darcy.)

Q. And is it or is it not a fact that Mr. William E. Schaefer remained as superintendent for the week of September 7 to September 13, and the week of September 14 to September 20, and the week of September 21 to September 27, and for the week of September 28 to October 11?

A. He was not considered that on that project, if that is a report from the office.

Q. He was not on the project at that time?

A. That is not his standing, that I understood him to be in [478] at the time.

Q. Now, William E. Schaefer, then, was not on this job as controlling superintendent of this job at any time, is that correct, or not?

A. You mean in daily operations?

Q. I mean superintendent on this job, Mr. Darcy.

A. Yes, as general superintendent.

Q. Well, you mean as general superintendent of all Mr. Schaefer's operations?

A. That's right.

Q. But did he superintend this job at all?

Mr. Olson: The witness already testified that Mr. William E. Schaefer was the general superintendent and was his superior officer, which would mean that he was in general charge of all projects, including this one.

The Court: That's what I understood him to say.

Q. The only thing I wanted to know, if William E. Schaefer came there and replaced you at all?

A. No, he didn't replace me.



(Testimony of Patrick L. Darcy.)

Q. O.K. Did you keep a daily report of your operations? A. Yes.

Q. And did you keep a record of the amount of work, and the hours expended, upon each of these structures? A. Yes. [479]

Q. And the time? A. Yes.

Q. Yes; and did you ever send that, or have that, or know that that was sent to Macri and Company within five days after the entry of the item, any item?

A. I wouldn't know whether that was or not. That wasn't part of the project responsibility.

Q. You did not do it?

A. I sent my reports to the main office in Portland every day.

Q. You did not do it, then? A. No.

Q. Nor did you ever give any of Macri's superintendents any record of any accumulated costs that you had had?

A. No, I turned it in to my superiors at the head office.

Q. Nor did you ever get any written direction from any of Macri's superintendents to do anything; correct?

A. Not that I could recall right now.

Q. I mean, you have none? A. Pardon?

Q. You have none? A. No.

Q. Did you ever give any writing to your home office at Portland within five days after having waited for any lumber? [480]

(Testimony of Patrick L. Darcy.)

A. At the end of every day there was a remark written on the back of the report pertaining to those things which was wrong.

Q. Was those things which were wrong, now, when you say which were wrong—

A. The lack of lumber, improper excavation.

Q. You mean those that were wrong in your operations, or wrong in Macri's operations?

A. Macri's operations.

Q. Now, isn't it a fact, Mr. Darcy, that you were sent on to that job for the purpose of keeping for trial use specific records? Correct, or not?

A. It was not.

Q. Does Schaefer and Company—you've been on other jobs of theirs, have you? A. Yes.

Q. Does Schaefer and Company keep a photographic record of all their jobs?

A. We make photographs of pretty near every job.

Q. Do you keep photographic records?

A. Not exactly what you would call photographic records.

Q. Had you operated the Mix Mobile before you came as superintendent on this job?

A. Mixomobile?

Q. Yes, sir. [481] A. No.

Q. And were you the one who selected it as the appropriate equipment for this job? A. No.

Q. And were you the one who removed the elevator from it so it could be used on this job?

A. No, that was done by the concrete crew, the ones who were using the machine on the operation.

(Testimony of Patrick L. Darcy.)

Q. Well, the concrete crew was under your direction, was it not?

A. Not altogether, directly; I gave general orders to the foreman in charge of it to do whatever they saw necessary to keep that work going, because there was times that I couldn't be right with the crew all the time.

Q. Now, is it or is it not a fact that you did a good deal of hunting, away from the job, while you were on the payroll for the job?

A. It is not a fact.

Q. Were you on the job all the time?

A. I wasn't on 1062 all the time.

Q. Or 1068?

A. I was on between 1062 and 1068 what time I wasn't away from the project on other business for the company.

Q. Then this note that counsel read, "Where was Darcy"—

A. On 1068. [482]

Q. You were on 1068 when he was looking for you on 1062, is that right?

A. Yes.

Q. Do I understand you to say that Macri's fine graders were always right where you were pouring concrete, or where you were building forms?

A. I did not. I said they were quite often there.

Q. Quite often?

A. More often than not.

Q. More often than not they were in your way, is that it?

A. Due to the fact that they had to be called back to correct their sub-grades.



(Testimony of Patrick L. Darcy.)

Q. Mr. Darcy, were any of your forms that you built in any way at any time in any part in any manner imperfect, at all? A. The forms?

Q. Yes. Did you ever make a mistake in a single form, building it, independently of the lumber, independently of the fine grading, and independent of the excavation, did you ever make a mistake in a form?

A. Not that I know anything about. If I had the engineers would have rejected it.

Q. Now, if the form itself was built wrong would that then affect its ability to fit in?

A. You mean into the excavation? [483]

Q. Yes, sir. A. Probably might.

Q. Yes, sir.

A. If the excavation is right and the form is made right, they fit together.

Q. Yes. Well, I'm saying, if the form was not made right, would that affect its fitting in the excavation?

A. Yes, it would, if the excavation was correct.

Q. Now, isn't it a fact, Mr. Darcy, that the government representatives do not check the form until it is set in and until it is reported as ready for checking as to level and everything else; isn't that a fact?

A. Sometimes they check it before it is completed, sometimes after.

Q. May I please understand that? You say they check it before it is completed, before the form is completed, did you say, sir?

A. Not as a final check.

(Testimony of Patrick L. Darcy.)

Q. No, but I'm talking about the check by the government, the official check for the government.

A. The final check for acceptance is checked after it is set.

Q. It is checked for grade in the floor, is it not?

A. Yes.

Q. And that is done before the concrete is poured? [484]

A. That's right.

Q. And then the final check, the final pay, is after the concrete is in—well, strike that; you wouldn't know that. Was there any instance of any form that you built that was out the least bit, at any time, anywhere?

A. In what manner?

Q. I don't know; any manner defective.

A. Not to my knowledge.

Q. Did you build the forms yourself?

A. No.

Q. Did you have a form foreman?

A. I had a form foreman in the yard. A few of the forms I did build myself, when I first started.

Q. Wasn't it a fact that you had at the fore part of the job, you had two or three or four carpenter foremen, and one or two carpenters, and that finally when you actually got to operating you had two foremen and a good many more carpenters? Wasn't that a fact?

A. We had a foreman in the yard and a foreman in the field.

(Testimony of Patrick L. Darcy.)

Q. Yes, after you actually got to pouring concrete.

A. No, that was all the time, all the way through.

Q. Well, when you had three foremen what were they for?

A. One foreman on the concrete crew.

Q. And when you had four foremen what were they for? Four carpenter foremen, I'm talking about, now. [485]

A. Carpenter foremen?

Q. Yes, sir.

A. We never had four carpenter foremen.

Q. Are you sure of that, sir?

A. To my knowledge there was never four carpenter foremen on that job.

Q. How many carpenters worked under one foreman on the job?

A. Anywhere from one to any amount.

Q. Well, how many did you have working under one foreman?

A. Well, it varied from two up to—the most I had on the job at any time were about 13, I think.

Q. So it would be from 2 to 13 men under one foreman, that you had?

A. Yes.

Q. And did you leave the responsibility for the correctness of those forms to those foremen?

A. I checked every form as the engineers checked them, when they were completed.

Q. Yes, Mr. Darcy, you checked them when they were in the cut, that's right, isn't it?

A. I checked them from the time they moved up to the hole to start building the form, back and

(Testimony of Patrick L. Darcy.)

forth to watch them put it in, until it was completed. If they weren't right when they were completed I had them correct whatever was necessary. [486]

Q. And if the form were too short or too long, you had to fill or dig out in order to get the form to the proper grade as shown by the control stake, correct or not?

A. I didn't get that question.

(Whereupon, the reporter read the last previous question.)

Q. Too high or too short.

A. We always used a panel large enough or made exactly to the right size to make that structure from the specified sub-grade to the top elevation.

Q. Is it possible that the form could have any defect in it that would determine an erroneous grade for the surface of the floor as poured?

A. Not the way we set them.

Q. Sir? A. Not the way we set them.

Q. It couldn't happen?

A. It could happen, but it didn't.

Q. It didn't happen once? In other words, each form which you set was perfect, is that right?

A. Every form we set corresponded to the specifications of the structure lay-out.

Q. Then that makes it perfect, doesn't it, according to the structure lay-out?

Mr. Olson: That's argumentative. You can ask him if the government accepted each one. That's the thing we're interested in.

(Testimony of Patrick L. Darcy.)

Q. The government doesn't accept the form; the government merely checks it, doesn't it, Mr. Darcy, to determine that it is then a proper time to pour the concrete, that the concrete will be right as to grade and as to wall, isn't that right?

A. They check, O.K., or re-check that form as being ready to pour the concrete, to make the structure come out to the specifications of the structure lay-out plan.

Q. And if it is too high they will have to take some earth out, and if it is too low they will have to put some in, won't they?

A. Whoever's responsible for that operation.

Q. They will have that done? A. Yes.

Q. You don't have to pull the form out to raise or lower it?

A. It all depends on how that form is built, whether they have to take that form out or not.

The Court: We will stop on this case now, and resume at 10 o'clock tomorrow morning. However, the Court has some other matters, and we will adjourn later.

Mr. Holman: Mr. Olson has kindly consented that I might call Mr. King and Mr. Black out of turn as part of our case, for these reasons, your Honor: They have [488] both been subpoenaed; Mr. King has a badly broken arm, and must go to his doctor Friday, and Mr. Black was taken off his own construction job, and the end of the month is approaching.



(Testimony of Patrick L. Darcy.)

The Court: I have no objection, if Mr. Olson hasn't.

Mr. Olson: May I withdraw, then, for the evening, plaintiff's identification 49 to erase it on the back?

The Court: Yes, you may take it out.

Mr. Ivy: There is one matter, your Honor, that will take a moment; I proposed an amendment to the answer of the Continental Casualty Company, which was a substitution of the first affirmative defense in the second cause of action; notice of the motion to amend was given, service acknowledged, and as I understand it, none of the counsel are objecting to that amendment. It is something I should have brought up at the start of the case.

Mr. Hawkins: No objection, your Honor.

Mr. Holman: No objection.

The Court: Did you get what he was saying, Mr. Olson?

Mr. Olson: I think so; that is the trial amendment which relates entirely to the application for the bond. I have no objection.

The Court: All right, the pleadings may be amended, [489] then, in accordance with your application.

(Whereupon, the Court took a recess in this cause until Thursday, February 27, 1947, at 10 o'clock a.m.)

Yakima, Washington, February 27, 1947  
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, I received this telegram from Mr. King, and I knew he was in bad physical condition. He evidently just had to go back to his home.

The Court: Who is Mr. King?

Mr. Holman: He was the witness I spoke of yesterday, your Honor, arranging to call this morning, so I won't need that. The other man has arranged his schedule so he can stay.

The Court: All right.

Mr. Holman: I'm still very much concerned about your Honor asking Mr. Macri during the week end to bring a copy of the assignment made to the bank. I have not received from Mr. Henry any telegram; I have received a certification by Mr. Henry that he's been unable to locate that assignment. Mr. Macri could find nothing whatsoever, and of course he couldn't get into his safe deposit box over the weekend. Did you show the Court the certification? [490]

Mr. Hawkins: No, I haven't submitted that to the Court yet. I still expect to hear from him.

Mr. Holman: I just don't like to go on continually embarrassed. I want your Honor to understand we haven't been able to get it.

## PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

## Cross-Examination

(Continued)

By Mr. Holman:

(Whereupon, the reporter read the last previous question and answer on February 26, 1947.)

Q. Mr. Darcy, I think on direct examination you said that you were out of lumber several times?

A. That's right.

Q. Sir? A. That's right.

Q. Was there ever a time that all of the lumber had been used in the forms and all of the forms had been filled with concrete? A. No.

Q. Was there ever a time that any of the forms constructed were all filled with concrete?

A. No, there wasn't.

Q. Well, there must have been at the time of the end of the job. I didn't mean to ask you a catch question, but I mean in your current operations you always had forms [491] ahead, did you not?

A. We had a few forms that were being stripped and moved up to set ahead.

Q. Yes; now, on the matter of stripping forms and moving them ahead, is it or is it not field practice that the forms before they are again used must be cleaned and must be re-cut to fit the other structures? A. Not the system we used there.



(Testimony of Patrick L. Darcy.)

Q. Well, I asked you if that was not field practice. Isn't that general field practice?

A. Not our practice.

Q. Could you answer my question, whether it is general field practice?

A. That's your answer; customary practice doesn't govern our operations.

Q. That's the customary practice, is it?

The Court: Answer the question, if you know what is the customary practice.

A. That may be other operation practice. I wouldn't know what you would consider customary practice.

Q. Have you done any work except for Mr. Schaefer, in concrete? A. Yes.

Q. Have you ever done any Bureau excavation work except for Mr. Schaefer? [492]

A. Not of this type.

Q. —Bureau concrete—you say not of this type? A. No.

Q. In other words, this is the first reclamation project you were on, correct? A. No.

Q. What other reclamation project were you on?

A. Some of the Grand Coulee work.

Q. And on the Grand Coulee work were the forms allowed to be pulled and used ahead without cleaning or re-framing?

A. This was different type of construction; up there the forms were only used once.

Q. They were only used once, yes. So in all your experience in connection with concrete structure,

(Testimony of Patrick L. Darcy.)

forms had been used only once until you came to this job, is that correct?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)

A. No, that's not correct.

Q. Well, what is the fact?                      A. What is it?

Q. What is the fact?

A. The type of job governs whether the form is used once or several times. [493]

Q. And on this type of job, was it such that the forms could be used several times, or once only?

A. The majority of them were supposed to be used a good many times.

Q. Now, in the matter of the use of lumber, were your estimates made upon re-use of the lumber, or not?

A. They weren't made on the re-use of the lumber; they was made on the re-use of the panels.

Q. Well, I don't mean to be captious. I'm talking, of course, about the lumber that's in the forms, Mr. Darcy.                      A. That's right.

Q. Was it or was it not a fact that you were furnished with an adequate supply of veneer at the commencement of the job, or do you know?

A. No, there wasn't.

Q. Well, you weren't there, were you?

A. I wasn't there, but I knew how much plywood was there, and knew how much would be required.

(Testimony of Patrick L. Darcy.)

Q. Now, when you first took charge, did you make a requisition for plywood?

A. Not the first day.

Q. How long was it before you made a requisition for plywood?

A. I think it was about the 26th of July, 1944.

Q. That would be about a month or so after you were on the job? [494]

A. Yes.

Q. And before you became, you say, superintendent on the job?

A. Yes.

Q. To whom did you make the requisition?

A. To Mr. Macri's superintendent.

Q. Who was that?

A. Mr. Mose Stickney.

Q. Mr. Stickney, yes; what kind of a requisition? Did you make an order, signed?

A. Just a written list.

Q. For veneer?

A. Including veneer and other dimensions of lumber.

Q. All right. Now, at that time were there any forms set?

A. Yes, there were.

Q. And had those forms been filled with concrete?

A. No.

Q. Had any forms been filled with concrete?

A. None.

Q. Had you made an estimate of the total lumber required for the job, Mr. Darcy?

A. Not at that time.

Q. Do you know what amount of lumber would, on the average, be required for structures throughout a job like this?

A. On that project, approximately 120,000 feet.

(Testimony of Patrick L. Darcy.)

Q. Approximately 120,000 feet; how do you arrive at that? [495]

A. By the regular system of estimating contact footage of forms.

Q. I didn't hear what you said.

A. By a regular system of estimating contact footage of forms, and approximate number of reuses per form panel.

Q. Well, will you amplify that? Explain it, will you?

A. Well, the contact footage—

Q. Just give us the steps; explain how you arrived at it.

A. The contact footage of form is the amount of form that contacts the concrete surface.

Q. Yes.

A. Take your structures as a general average, or take them one by one, and figure them all out, as you wish.

Q. All right, what was the general average?

A. Well, the average would be so many settings of each certain type.

Q. I'm talking now about the average requirement of board feet per structure.

A. I haven't those figures right now; I could look them up.

Q. Can you give me approximately it?

A. Approximately 150 or 160 feet per cubic yard.

Q. 150 or 160 feet per cubic yard of concrete poured, is that the idea?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Then it would require, would it, for a seven inch wall [496] more lumber than for a five inch wall? A. Of course not.

Q. And would it require more lumber for a seven inch base than a five inch base? A. No.

Q. Then how do you tie that to the cubic yardage? Why don't you tie it to surface area, in your computation?

A. I don't quite understand what you ask.

Q. Why do you tie it to cubic yardage, say it takes so much per cubic yard, when the surface is the thing that controls it?

Mr. Olson: Your Honor, counsel asked this witness how much it took per cubic yard on this job.

Mr. Holman: No, I didn't, your Honor.

The Court: Let's talk one at a time.

Mr. Olson: Counsel asked this witness—I don't think it is proper cross-examination anyhow, because I didn't go into it, but I'm not particularly interested in that. He asked this witness to give the approximate amount of lumber it took on this job. He answered so much per cubic yard, and counsel wants to know why you give it in cubic yardage instead of square footage.

The Court: I think I'll overrule the objection, if it is an objection. I think this estimate of 120,000 board feet, I suppose, for the whole job—is that 1062 [497] and 1068 both?

Witness: No, 1062 only.

The Court: I wonder if we could have it understood here that we're talking about 1062 unless it is otherwise specified?

Mr. Holman: Yes, your Honor.

(Testimony of Patrick L. Darcy.)

The Court: If you want to talk about 1068, mention 1068, otherwise I'll assume you're talking about 1062. Is that acceptable?

Mr. Olson: That's acceptable.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Darcy, if you were going to estimate the lumber to cover this side of the room, why would you estimate instead, as a test, the amount of structure behind this wall? Why do you tie it to quantity instead of square footage?

A. Possibly I wouldn't, on fashioning that wall.

Q. All right, why do you do it in structures?

A. On those structures they run from five to eight inches, and they were figured on a general average, because all panels were used for the same walls, whether five, six, seven, or eight.

Q. Isn't it a fact you have taken the total amount of lumber under the tabulation and divided it by the cubic yardage to get your average, and that you didn't do it in [498] the field?

Q. Yes, sir, in the field; you knew the surface you wanted, and you determined the lumber by that surface, didn't you? A. Not entirely.

Q. Your carpenters had to, didn't they, Mr. Darcy? A. What's that?

Q. Your carpenters had to do that, didn't they? They had to cover a surface?

A. The carpenters set the forms, yes.



(Testimony of Patrick L. Darcy.)

Q. They had to cover a surface, didn't they?

A. That's right.

Q. And that determined the area?

A. Naturally, the surface area.

Q. And that determined the quantity of lumber, didn't it?

A. Not necessarily.

Q. What else would there be?

A. It would determine the quantity of lumber if you figured it out merely as surface contact of each form all the way through, but for the purpose of determining the amount of lumber needed you don't have to figure every foot of each structure when you've got a set up average.

Q. How much at any time of the forms remained unpoured when you called for lumber, how many forms? [499]

A. What was that?

Q. How many forms remained unpoured at any time you called for lumber, forms set up in the excavation?

A. About the most we would have set when we would be running out of lumber for setting more would be approximately 25 or 30, at the most.

Q. How many did you have when you made this first demand?

A. Right off hand now I wouldn't say.

Q. Well, didn't you tell your own counsel how many were there when you came on the job?

A. You mean how many were set?

Q. Yes, how many forms were set?

A. Yes.

Q. How many were?

(Testimony of Patrick L. Darcy.)

A. Between 24 and 25, when I first went there.

Q. Yes, sir. Now, then, when you made this demand of lumber, how many forms had been increased, from 24 to 25, or how many were there?

A. Oh, possibly 30 more.

Q. So that between the time you came in June and the time in July that you gave this list to Mr. Stickney there had been 20 or 25 forms additional built?

A. I wouldn't say exactly. There were approximately that.

Q. But none of the first forms had yet been poured with [500] concrete? A. No.

Q. Then when did you next make a demand for lumber?

A. I'd have to refer to the records before I would answer that.

Q. Now, at the time you made the demand for lumber in June, or July, it was pretty hot out there in the field? A. Yes.

Q. And the lumber in the forms standing empty, without concrete, had a tendency to crack, did they not? A. Not to crack, but to shrink.

Q. Yes, to shrink; in other words, the usual heat action on lumber? A. Yes.

Q. And when you put the forms in was the same weather condition prevailing? A. Yes.

Q. And it had the same effect, did it?

A. Well, it didn't have the effect on the lumber that we had there on hand at the time we started



(Testimony of Patrick L. Darcy.)

the first of July, because that lumber had already been there and dried out, what little there was of it.

Q. In other words, it was weather cured then?

A. Yes.

Q. But after you built the structure and left it unfilled [501] the weather began action on it, did it not?

A. Yes.

Q. And to that extent the efficiency of the forms was somewhat depreciated, wasn't it?

A. Well, if they set for a good length of time it might be, a little.

Q. Hadn't they set for a good length of time then?

A. Some had.

Q. How long had they been setting?

A. I don't know, I wasn't there when they were set.

Q. Well, how long had they been setting after you got there, before concrete was poured in them?

A. The ones that was set when I arrived there remained another month before they got concrete.

Q. Actually there was no concrete poured until the month of August, was there? July 31, I think was the date.

A. That's correct.

Q. Up to that time there had been no concrete poured. Now, can you tell me whether or not in advance of that date the Mixomobile was standing by on this job ready to pour?

A. No, it wasn't.

Q. Where was it?

A. Working in Portland.

(Testimony of Patrick L. Darcy.)

Q. In other words, it was working on another job?

A. Well, I wouldn't swear to whether it was working or not; [502] it was in Portland.

Q. And was there any mix machine on the job for Schaefer until the Mixomobile came up?

A. No.

Q. The other 200 jobs Mr. Schaefer spoke of were currently going along and his equipment was being used on those, weren't they?

A. I presume so; that was in Portland.

Q. If you know; I don't want presumptions. If you know, say.

A. Well, I'll say no, being up here.

Q. Weren't you a Portland man, and weren't you operating out of the Portland office, and taking directions from Portland?

A. That's right.

Q. And still you do not know?

A. I was up here.

Q. Did you make any request for delivery of a mixer when you came to the job? A. No.

Q. When you became superintendent?

A. It was already on the job.

Q. In other words, there was no equipment there for mixing concrete until you were on the job?

A. No. [503]

Q. Until you were on the job as superintendent?

A. No, it was there before.

Q. What is the distinction between superintendent and carpenter foreman, on this job?

(Testimony of Patrick L. Darcy.)

A. Well, on this job there isn't much distinction between superintendent and foreman when the superintendent has to get out and work along with the men to see that things are able to move.

Q. But isn't it a fact that on the Schaefer payroll from beginning to end you're designated only as carpenter foreman?

A. I don't know what's on the certified payroll.

Q. Didn't you at my request look at it? I asked you to do it; didn't you look at it last night?

A. You didn't request that I look at it last night.

Q. I thought I did, Mr. Darcy?

A. I didn't understand you to ask that.

Q. I think you already told me you prepared the time to send in to the Portland office?

A. That's right.

Q. And designated the men?

A. That's right.

Q. And you designated yourself each time as carpenter foreman?      A. No. [504]

Q. What did you designate yourself as?

A. Superintendent, on most of them.

Q. Well, when you say "most of them," beginning when and ending when?

A. Well, I'd have to look through the records there to find out when.

Q. So that if the payrolls show you as carpenter foreman, that is not a correct position you had with Schaefer, is that right?

A. That would be correct, yes, but possibly not sufficient as a technical designation of actual capacity.

(Testimony of Patrick L. Darcy.)

Q. In your field work you spoke of being over at 1068 when the government man, Reynolds, in his field notes asked "Where was Darcy." What were you doing at 1068 at that time?

A. Checking the progress of operations down there, condition of excavations.

Q. Were you working on 1068 at all at that time? A. No.

Q. In other words, you went over to 1068 for the purpose of checking up on Macri's operations over there, to report to Mr. Schaefer, correct?

A. Correct.

Q. You didn't go over there for the purpose of doing anything in connection with accelerating the work on 1062, did you? [505] A. No.

Q. All right, how long were you over on 1068, just a day, or a considerable time?

A. Do you mean on that instance?

Q. Yes, at the time this man is asking where you were. A. About three hours.

Q. Now, isn't it a fact that you weren't on that job at all that day? A. No, it isn't.

Q. And isn't it a fact that your crew had no guidance that day? A. That's not a fact.

Q. And isn't it a fact that was frequently so, Mr. Darcy, frequently you left your crew without any instructions or supervision?

A. No, that's anything but a fact.

Q. Isn't it further a fact, Mr. Darcy, that Mr. Will Schaefer was sent up there for a period of three weeks as superintendent, and then came back again for a period of an additional week as super-

(Testimony of Patrick L. Darcy.)

intendent, charged to this job at \$100.00 a week, for the purpose of determining whether or not the work should continue or they should quit?

A. No, it isn't.

Q. That is not a fact? O.K. And is it not a fact that before you came up you had a talk with Mr. William Schaefer [506] and got rather specific instructions what not to do? A. No, it isn't.

Q. And isn't it a fact you got rather specific instructions as to what to look for and make notes upon so it could be used later against Macri?

A. It is not.

Mr. Holman: Now, these pictures, are you going to identify those now, Mr. Olson?

Mr. Olson: Yes.

Mr. Holman: Would you be willing to do that so I can go on with my examination?

The Court: Have you got the ones picked out you're going to use, Mr. Olson?

Mr. Olson: Yes, your Honor. We couldn't get new pages for that. I have new tabs all ready to insert them, but I was reluctant to take them out of that identification except in court.

The Court: Oh, I see, you have already got this marked.

Mr. Olson: I was going to suggest we re-mark this under the same identification and I'll transfer the pictures right here. I think the witness is going to have to at least tell the court that it is a picture of structure number so and so, taken a certain date.



(Testimony of Patrick L. Darcy.)

Mr. Holman: That, of course, we would expect.

Mr. Olson: So I'll have to do it right in court. For that reason I haven't transferred the pictures out of that album.

The Court: You haven't reached any agreement with counsel as to what ones may be presented without identification?

Mr. Olson: No.

Mr. Holman: We haven't been asked.

The Court: Well, they will have to be offered one at a time, then, I should think. That's the only way I can see to handle it if you haven't any agreement.

Mr. Olson: Well, I see what your Honor is suggesting. I had first assumed that there would be no specific objection made to one picture that wouldn't apply to the others. Do you feel that there will be a specific objection made to any one photograph that will not apply to the others?

The Court: Well, as I recall, there were some of those taken by this witness and some were not.

Mr. Olson: That is correct. I'll have to start out with the ones taken by Mr. Darcy, and transfer those, and still not offer it until I have the others identified by Mr. William Schaefer. I'm perfectly willing to proceed.

Mr. Holman: Well, I can proceed a little ways, your: [508] Honor, with the cross-examination, but with these pictures behind us and not available for cross-examination it does rather hinder.

(Testimony of Patrick L. Darcy.)

The Court: Well, suppose you go ahead and put the pictures in, then. We'll take this witness off and put on whoever is necessary to put them on.

Mr. Olson: I'll start with Mr. Schaefer.

The Court: Identify them one at a time, if counsel insists on that.

Mr. Holman: No, I don't think we'll insist on that.

The Court: Are those placed in the album so that you can refer to them in a way that will identify each picture?

Mr. Olson: I was going to suggest we put a little number on each one, if we can.

The Court: Well, you've got the whole thing marked as plaintiff's 49.

Mr. Hawkins: Your Honor, so that there will be no misunderstanding, my objection to these pictures was that there is a great deal of written material connected with the picture and on the reverse side. If counsel wants to remove that and then ask his witness whether these pictures represent the situation out there——

Mr. Holman: We have not asked for individual identification, [509] your Honor.

The Court: I assumed you were going to. If not, they can be identified as a whole. As I understand, you have removed the writing on the back of each picture.

Mr. Olson: That's correct, with the exception of the date, and in some instances the number of the structure. This has 3/4/45. Now, here's one that it's not removed on.

(Testimony of Patrick L. Darcy.)

The Court: You mean the writing isn't?

Mr. Olson: I thought we had all this off.

The Court: Is there any objection to leaving the date and the structure number on the backs of those?

Mr. Holman: I think that should be on there, your Honor. If it isn't, we'll get lost after while as to what it covers.

The Court: Of course, if counsel wants to show the date, that would be material. If it isn't shown, it can be on cross-examination.

Mr. Holman: What I do object to is handing up this album and having him identify it by the reading below.

The Court: Well, yes, that is objectionable, but if you'll have the witness tell which ones he's taken, and what they represent, then we can offer them as a whole, with the understanding that they will be transferred [510] to another album on which there is no writing, and also that any writing on the backs of each picture other than the structure number and the date will be removed by the clerk, if that hasn't already been done.

Mr. Olson: I thought it was already done.

The Court: If there are any that have been missed it will be removed by the clerk. Is that satisfactory?

Mr. Holman: Satisfactory.

Mr. Hawkins: Yes, your Honor.

(Whereupon, the witness Darcy was temporarily excused from the witness stand.) [511]



Yakima, Washington, February 27, 1947

(All parties present as before, and the trial was resumed.)

WILLIAM E. SCHAEFER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Olson: I wonder if we can have this new album marked as plaintiff's exhibit for identification 49, then?

The Court: Yes, I assume there is no objection to the transfer.

Mr. Holman: I do request counsel that he not show the witness the picture in the album with the label below. I object to that strongly. Let him see the picture, but not the endorsement below. Take the picture out; it has to go in the other album anyway.

Mr. Olson: Well, I'll start out that way. I think the witness has got a right to refer to the notes.

The Court: If he made the notes and it is necessary to refer to them to refresh his memory, he may do so. It isn't proper to read them into the record. I'm assuming he made the notes.

Mr. Olson: Will it be agreeable, your Honor, if I refer to these pictures as 49-1——

The Court: Well, you haven't got more pictures there [512] than the letters in the alphabet?

Mr. Olson: I think we have. There's one or two that I don't expect to offer; for instance, one

(Testimony of William E. Schaefer.)

is a picture of the fog; I don't see anything to be gained by putting in a picture of the fog, or a panorama.

The Court: You can number them individually, then, and they will be a sub-number in the album.

Mr. Olson: Can I do that for convenience as I hand them to the clerk?

The Court: Yes, that's all right.

### Direct Examination

By Mr. Olson:

Q. Handing you a photograph which is designated plaintiff's 49-1, I'll ask you to state what it is. Not what it shows, just what it is.

Mr. Holman: I'm wondering if we can't get the date it was taken and where it was taken in each instance. Could we do that?

Mr. Olson: Well, this particular picture we didn't take, your Honor. It is one that was taken by the Bureau of Reclamation. I simply want to ask if it is a fair picture of the mixer that was out there on the job.

The Court: At about what time?

Q. Do you know about when that picture was taken, Mr. Schaefer? [513]

A. I'd say that was taken the first part of August.

The Court: That would be 1944?

A. 1944. I didn't take the picture.

Q. And is that a fair representation?

A. That is a fairly good picture of the Mixo-mobile.

Q. Of who?

(Testimony of William E. Schaefer.)

A. Of the Concrete Construction Company, and the water wagon.

Mr. Holman: Could you pass that through us to the clerk as you go along?

The Court: Well, we've got back to identifying these one at a time, as I originally suggested. Is there any method by which you could group them, of the pictures made by the witness?

Mr. Olson: Under the suggestion of counsel it appeared to me I could just transfer these and have Pat Darcy testify, if he will, that they were taken on the job and show a fair representation of the conditions there, and number them, and then let counsel cross-examine on any they want to. If that's agreeable I can transfer these pictures.

Mr. Holman: What is this marking "25-26?" Is that the picture number?

Mr. Olson: That is the structure number, as I understand it, of the particular structure.

Mr. Holman: I think that should be explained.

Mr. Olson: I think I can do that in the group without doing it picture by picture. I can ask Mr. Darcy about all of this, if they're not going to object on the ground he didn't take them.

Mr. Hawkins: Can't he take a block of those pictures and state they were taken about the 1st of August, 1944, and that they are an accurate representation, instead of going over picture by picture?

Mr. Olson: I think so.

(Testimony of William E. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Showing you this second picture, 49-2, I'll ask you approximately when that was taken?

A. The 1st part of August.

Q. And what is it a picture of?

A. It is a picture of structure 61, of the Buggymobile ready to pour concrete in said structure.

Q. And whose Buggymobile is it?

A. Buggymobile of Concrete Construction Company.

Q. Taken by the Bureau of Reclamation?

A. I believe that picture was taken by the Bureau of Reclamation.

Q. Now, Mr. Schaefer, if you'll take this album, can you tell us how many of the pictures were taken by you?

A. I took all these pictures on this page.

Q. Well, now, that is the first page in the album?

A. Yes.

Q. Now, did you also take all the pictures on the second page?      A. Yes.

Q. Did you also take all the pictures on the third page?      A. Yes.

Q. Did you also take all the pictures on the fourth page?      A. No.

Q. Did you take any of the pictures on the fourth page?      A. No.

(Testimony of William E. Schaefer.)

The Court: I think the record should show there are four pictures on each of those pages he says he took, is that right?

Q. There are four on each of these pages you said you took? A. Yes.

Q. Did you take those pictures at approximately the same time, do you know?

A. I can tell by looking at the back of the picture.

Q. Well, let's do it.

A. That picture was taken May 10.

Mr. Holman: What is that number?

Q. That will be number 4. Take a look at all four pictures on the first page, Mr. Schaefer, which will be numbered 3, 4, 5, and 6, and see if they were not all taken on May 10, 1944.

A. Yes, all taken on May 10. [516]

Q. Now, will you turn to the second page, Mr. Schaefer, and see if these pictures were taken on the same date?

A. I believe all the pictures I took in here I took the same date; I'm not sure.

Q. All right, then, referring to plaintiff's 49-7, will you look on the back and see if you can tell what excavation number that is, or what structure?

A. That is a picture of the excavation of structure number 43 and 44.

Mr. Olson: That should also, I assume, show on the bottom of the picture.



(Testimony of William E. Schaefer.)

The Clerk: They can take it out if they want that information. I'm just going to put the number on it.

Mr. Olson: That's agreeable. It shows on the back of the structure number, and it is agreeable if it isn't written again on the front.

Mr. Holman: I'm perfectly willing to make you my personal representative to see that there is nothing on there that shouldn't be.

Mr. Olson: Thank you.

Mr. Hawkins: To expedite this a little, I wonder if the witness could not take these pictures and write the date and also the station and then just offer them in the mass?

Mr. Olson: I'll do that after I finish these few, if [517] the Court will permit me; I'll make the transfer of the balance of them with Mr. Darcy and offer them in mass.

The Court: It would be more convenient to have the date and station number on the face of the picture, otherwise we'll have to be pulling them out all the time, but I wonder if that couldn't be done at adjournment?

Mr. Olson: We'll do that, your Honor.

The Court: It is on the back now and you can transfer it to the front some time during adjournment.

Mr. Olson: That being the case we'll just transfer these and I won't ask about the structure numbers at the present time.



(Testimony of William E. Schaefer.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Now Mr. Schaefer, there have now been removed from the book all of the pictures that you yourself took?

A. Yes, so far as I see now.

Q. And they were all apparently taken on May 10, 1944?

A. Yes.

Q. And on the Roza Project?

A. That's right.

Q. 1062.

Mr. Holman: How many is that?

Mr. Olson: Twelve pictures.

Mr. Holman: That would be 49-12?

Mr. Olson: No, the first two were Bureau pictures. [518]

Mr. Holman: 49-14 will cover Mr. Schaefer.

The Court: That will be 3 to 14, taken by William Schaefer?

Mr. Olson: Yes. That's all for Mr. Schaefer.

The Court: Any questions on these exhibits?

Mr. Hawkins: No questions at this time.

Mr. Holman: No, your Honor.

The Court: Or identifications; they're not in evidence yet.

Mr. Holman: May I understand these were all on May 10?

Witness: Yes.

(Testimony of William E. Schaefer.)

Mr. Hawkins: What kind of camera was that?

Witness: I think it was a 116; it was a small box camera.

(Whereupon, there being no further questions, the witness was excused.) [519]

Mr. Olson: As I understand it, we'll make the transfers ourselves of the rest of these pictures?

The Court: Yes, you may do that.

Mr. Olson: Or we can do it right now, whatever—

The Court: Well, we might want to refer to them and look at them. They should be out of the album where the writing appears. Perhaps you had better just transfer them now.

### M. C. SCHAEFER

the plaintiff, a witness in his own behalf resumed the stand and testified further as follows:

#### Further Direct Examination

By Mr. Olson:

Q. Showing you picture number 15, did you take that picture, Mr. Schaefer? A. I did.

Q. And on what date?

A. On September 4, '44.

Q. And whereabouts? A. At the job yard.

Q. What is it a picture of?

A. That is a picture of the forms in the yard.

(Testimony of M. C. Schaefer.)

Q. Showing you picture number 16, did you take that picture?      A. I did.

Q. And when was it taken?

A. That was taken September 22.

Q. And whereabouts?

A. In the job yard.

Mr. Olson: I think that I should advise your Honor that I believe this is a duplicate of a picture that is already in evidence.

Witness: I believe so. [520]

Mr. Olson: I recognize it. I don't know as it will make any difference.

The Court: Well, if you wish to keep the continuity in the album, why not make a notation parenthetically on the bottom of it, "duplicate of number so and so"?

Q. Handing you picture number 17, I'll ask you if you took that picture?      A. I did.

Q. And on what date?

A. On September 4.

Q. And it is a picture of what?

A. Of forms in the job yard.

Q. Handing you picture number 18, I'll ask you if you took that picture?      A. I did.

Q. On what date?

A. On September 22, '44.

Q. And of what is it a picture?

A. It is a picture of the job yard, the lumber, and brother Bill is in that picture.

Q. Handing you picture number 19, did you take that picture?      A. I did.

(Testimony of M. C. Schaefer.)

Q. What date? A. September 22.

Q. And where? [521]

A. In the job yard.

Q. And what is it a picture of?

A. It is a picture of some second hand lumber.

Q. This entire page of which the picture I just spoke of is *one are* already in evidence, are they not?

A. I believe the four pictures are in evidence.

The Court: Why not just skip that page, if it won't disarrange your order?

Mr. Olson: You'll just have to take that page out. That's all, then, for Mr. Schaefer.

#### Cross-Examination

By Mr. Hawkins:

Q. What kind of a camera did you use, sir?

Mr. Olson: You're asking for the trade name, are you, counsel?

Witness: I think that that was taken with a Speed Graflex.

Q. What's that?

A. I couldn't tell you that.

Q. Cut film? A. It is a pack film.

Mr. Hawkins: That's all.

The Court: Any other questions?

(There being no further questions, the witness was excused.) [522]

PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Mr. Olson: You can take the next out. Counsel, I'm speaking of this next page. It is a picture of the fog and a paroramic view, and lumber, that's already in evidence.

The Court: I don't think they will object to skipping them. Have them available if they want to take them up and identify them.

Redirect Examination

By Mr. Olson: .

Q. Showing you picture number 19, then, Mr. Darcy, I'll ask you if you took that picture?

Mr. Holman: I move that the testimony of M. C. Schaefer with respect to 19 be stricken, then, or otherwise they will be duplicated.

The Court: I think the record should show that the testimony of M. C. Schaefer with reference to sub-identification 19 be stricken, and it is understood that picture be withdrawn.

Witness: Yes, I took that picture.

Q. On what date? [523] A. March 10, '45.

Q. And whereabouts?

A. Structure 461-62-63, east turbine lateral, on 1062.

Q. And is the picture a picture of those structures? A. Yes.

Mr. Holman: Is that indorsed on there?

Mr. Olson: We'll make the indorsement. This picture has a notation on it which should be re-

(Testimony of Patrick L. Darcy.)

moved. As I understood, your Honor was suggesting that I do have him state what it is a picture of.

The Court: Well, if he can identify them in groups or pages, I think it would save some time here. I'm familiar with the pictures, and I can't say whether counsel would object, but you might try it, if you think you can.

Mr. Olson: I don't think I can do it quite that general, your Honor.

Mr. Holman: Mr. Olson, did Mr. Darcy take the rest of these?

Mr. Olson: Yes, that is, he can identify them. I think there is one or two here that he appears in the picture. While he didn't take it, he can identify it.

Mr. Holman: I'm just wondering if you couldn't hand them all to Mr. Darcy and then put the dates and the structure on the picture, and save a lot of time [524] unless you want it in the record. You've got 98 to list, is what I was trying to help you on, counsel.

Mr. Olson: Well, we're up to 20 some, and it goes pretty fast. I think we can go through this pretty fast, your Honor. That's 19 you have there?

The Clerk: Yes.

Mr. Holman: Could he tell us the camera he used? Then we won't have to ask that again.

Q. What kind of a camera did you use?

A. Brownie V-616.

The Court: On all of them that you took?



(Testimony of Patrick L. Darcy.)

A. The majority of these, yes. I think there aren't more than four of the pictures in the entire lot here that were taken with a Contax camera number—I don't remember what number it was.

The Court: Are the remaining pictures all the same size?

A. They're all the same size picture.

Q. All right, Mr. Darcy. Handing you picture number 20, I'll ask you when that picture was taken.

A. March 10, '45.

Q. By whom? A. By myself.

Q. And of what is it a picture?

A. It is a picture of the Benton County caterpillar towing [525] our mixer away from structure 479-480-481.

The Court: Did you take all the rest of them in that album, Mr. Darcy?

A. Except the ones in which I'm shown.

The Court: Will you point those out when we get to them, and after this you won't have to ask that question each time; just what it is and when it was taken.

Q. Picture 21, would you state when that was taken? A. March 10, 1945.

Q. And of what?

A. Pouring operations on east turbine turn-out slab, structure number 461-62-63.

Q. Now, these pictures, Mr. Darcy, are all on 1062 unless we designate otherwise?

A. That's right.

(Testimony of Patrick L. Darcy.)

Q. Picture number 22, when was it taken?

A. March 10, 1945.

Q. And of what?

A. Pouring slab and turn-out, east turbine, 461-62-63.

Mr. Holman: A different view of the same operations, is that the idea?

A. Different view of different parts of the structure.

Q. Picture 23, when did you take that?

A. March 10, 1945.

Q. And a picture of what? [526]

A. That is the Benton County caterpillar moving our mixer on the next move down from 461-62-63.

Q. Now, picture number 24, when was that taken? A. February 9, 1945.

Q. That picture you did not take, I assume—did you?

A. No, I took that picture.

Q. Where was it taken?

A. In our yard at 1062.

Mr. Holman: Is that the same as the job yard that you previously referred to?

A. Yes, the job yard.

Q. What is it a picture of?

A. That is a picture of the first two loads of lumber that were delivered for construction on the turbine lateral, chute and stilling pool and separation structure.

(Testimony of Patrick L. Darcy.)

Q. Showing you picture number 25, when was that picture taken, if you know?

A. I didn't date that picture, and it was dated as received in the Portland office March 4, 1945. It was taken about—that would be the previous Sunday to that date.

Q. What is it a picture of?

A. It is just another picture of the turbine lateral chute lumber in the yard, showing how it was covered and protected from the weather.

Mr. Holman: You say it was the Sunday previous [527] to what date?

A. The Sunday previous to March 4, which was the date it was received in the Portland office.

Mr. Holman: He didn't take that picture; he wasn't on the job.

Mr. Olson: It was 1945.

The Court: I didn't hear what Mr. Holman said.

Mr. Holman: I said he was not on the job. I didn't hear him say it was 1945; in 1944 he was not there.

The Court: Oh, yes.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Picture number 26, when was that taken?

A. That is another one of a series of the same roll here, that was taken on that particular Sunday.

Q. The next three are all the same date?

A. Yes, and I think that's all from that roll.

Q. All right; now, number 26, what does it show?

(Testimony of Patrick L. Darcy.)

A. It shows construction, the frame construction, of the turbine lateral chute, inside form sections.

Q. And number 27, where was that taken, and of what?

A. That was taken up alongside of the chute site; shows a load of material set off there ready to be set in place for pouring.

Q. Number 28, what is that a picture of? [528]

A. That shows a series of the outside form panels set for turbine chute, ready to receive the inside form sections.

Q. Now, referring to the next page, can you tell us, were they all taken on the same date?

A. They were all taken on the same date, on the turbine chute, showing operations, the setting, and so on, on the turbine chute construction.

Q. What date were those taken?

A. On the 7th of March, 1945.

Q. Now, picture number 29, these pictures as a group show what, Mr. Darcy?

A. The operation of moving a form section, cleaning, resetting, and finishing of the concrete, and one form in place with steel weights on it to hold it down against the lift of pouring concrete.

Q. And that would be referring to a group of six pictures, which would be 29, 30, 31, 32, 33, and 34?

The Court: We'll take a mid-morning recess now for ten minutes before we proceed. That finishes that group, up to 34.

(Short recess.)

(Testimony of Patrick L. Darcy.)

(All parties present as before, and the trial was resumed.)

Redirect Examination  
(Continued)

By Mr. Olson:

Q. Handing you pictures numbered 35 and 36, what do they [529] show, Mr. Darcy?

A. They show the actual pouring operations on the turbine chute, mixer placing concrete.

Q. And how about pictures 37, 38, and 39?

A. 37 is the picture we spoke of a bit ago of myself stripping the transition section at the lower end of the chute.

Q. Now, that picture you didn't take?

A. No.

Q. But you appear in the picture?

A. That was taken by the inspector on the job, with my camera.

Q. All right.

A. 38 is a picture down the chute.

The Court: If he was present why not have him show what that picture is, and if there is no objection, we can let it go in with the others.

Q. What does 37 show?

A. Well, it shows me stripping the transition section preparatory to moving it to another setting.

Q. Now, the Clerk has all those pictures numbered, Mr. Darcy. Could you go through them in

(Testimony of Patrick L. Darcy.)

numerical order and state what each picture shows, without giving anything argumentative?

Mr. Holman: How about the dates? [530]

Mr. Olson: Well, the dates, as I understand it, appear on the back, and we are to transfer on to the front of the picture the date and the location.

The Court: Does Mr. Darcy know what dates are shown on the back of the pictures?

Mr. Olson: Not without looking, I don't believe. We would have to take them out and put them back.

Mr. Hawkins: Are you the one who put the dates on the back?

Witness: Yes.

The Court: Did you put on the date in each instance? A. Yes.

The Court: Well, why not let it go at that? If counsel want to inquire, they can take the individual picture.

Redirect Examination  
(Continued)

By Mr. Olson:

Q. Now, take the picture and state what it is.

A. Number 35 shows the mixer pouring concrete in the chute section; 36, another view of the same thing; 37 shows me stripping a transition section; 38 shows the inside sections of the chute forms set up ready for the second pour; number 39 shows the same thing with the rock weights in place.

Q. Well, this particular group of pictures which you have [531] just referred to all refer to that turbine chute? A. Yes.



(Testimony of Patrick L. Darcy.)

Q. Then proceed, beginning with picture 40.

A. 40 shows the outlet end of the stilling pool, the lower end of the chute; 41 is another angle shot of the same structure showing some of the construction on it; 42 shows the separation structure where the east and west turbine laterals separate, finished and back filled; 43 shows the separation structure under construction.

Mr. Holman: The same structure?

A. The same structure, only the forms under construction; number 44 is another picture from the other end of the separation structure, showing the form construction.

Q. Now, referring back, Mr. Darcy, to picture number 40 of the stilling pool, was that, with reference to time near the end of the project?

A. That was the last work we did.

Q. And is that the part of the project that was referred to by Mr. Sektnan, I believe, and I believe another witness, that the fine graders were working in the same hole with you?

A. That's right; this is it.

Q. All right, proceed, Mr. Darcy.

A. Number 45 shows structure number 290-91-92 in place ready to pour; number 46 shows the excavation for [532] number 294-A.

Q. Now, with reference to number 46, that excavation, was it in that condition, if you know, Mr. Darcy, when the Marci crew had left it and when your men first arrived for installation of forms?

A. That's right; that's the way it was when the carpenters got there to set forms.

(Testimony of Patrick L. Darcy.)

Q. Can you describe that, without reference to the picture, describe that particular excavation?

A. Well, just a square hole in the ground, absolutely vertical banks, the entire hole was dug by hand; it was one that they had missed previously and came back to dig later, and it was just six inches larger than the actual concrete dimensions of the structure, on all four sides.

Q. Was that excavation wide enough, then, to get your form panels in place?

A. No, it was impossible.

Q. Now, you say it was a square hole. Was that particular structure a square structure?

A. Yes, just a little square structure with an outlet gate on the side. The hole was approximately four and a half feet deep.

Q. How was it for depth?

Mr. Holman: I'm sorry, I just can't hear you. Four what deep? [533]

A. Four and a half feet deep. You mean for sub-grade?

Q. Yes, for sub-grade.

A. Well, the sub-grade was high.

Q. All right, you may proceed.

A. Number 47 shows structure number 346 revised, 347 revised, just poured.

Q. What do you mean by revised?

A. It is a structure that the Bureau of Reclamation had re-designed for a certain purpose at this particular station. Number 48 is another picture of the opposite side of the same structure. Number 49 is structure number 368 revised, 369 revised.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I'm awfully sorry, but I wonder if you can't either talk a little louder or a little slower or something?

(Whereupon, the reporter read the last previous answer.)

A. Number 50 is number 345-A.

Q. Now, that's what 345-A what?

A. Structure number 345-A. Number 51 is structure number 342 revised and 343 revised. Number 52 is structure number 344, number 52 is structure number 426, number 54 is structure number 447-448, number 55 is structure number 339, revised, 340, revised. Number 56 is structure number 415-A, number 57 shows one of the [534] standard weir box inside form sections; number 58 is another view of the same thing; number 59 is another angle of the same subject, and number 61 also.

The Court: How about 60?

A. No. 60 is a completed back filled structure that has been in service a portion of one season, structure number 275-B, 275-C.

Q. Now, that structure, or picture number 60, was taken, then, I take it, sometime after the completion of the project?

A. That was one I have no date on. It was taken in the fall of 1945.

Q. It has no particular value except to show one of them that's in use, I take it?

A. That was all it was for. Number 62 shows the turbine chute, inside form sections, finished with

(Testimony of Patrick L. Darcy.)

and cleaned and returned to the yard, stacked, ready for delivery to Macri and Company; number 63 is another view of the same material; number 64 shows the other types of forms, outside panels for chute and loose lumber cleaned and stacked, ready for delivery.

Mr. Holman: Those are in the job yard, weren't they?

A. In the job yard; 65 shows approximately all of the inside form sections for the turbine chute, and some of [535] the outside form panels, ready for delivery. Number 66 shows a Macri truck from 1068 loading some of the inside chute form sections to take to 1068. Number 67 and 68 are two views of number 427-428, of which the demonstration excavation and structure were made.

Q. Now, you refer to structure numbers?

A. 427-428.

Q. You say those are the structures to which the models refer?

A. Yes. Number 69 shows my pick-up with a load of the final bit of equipment, ready to go to Portland.

Q. On what date?

A. That was on the morning of April 8, 1945.

The Court: Was that 69? A. Number 69.

The Court: Returning to 68, here, you say that is number 427-428. Isn't that just one structure that is shown in the model here?

A. That is two structures.

The Court:

(Testimony of Patrick L. Darcy.)

Q. It is one excavation.

The Court: Oh, I see, one excavation and two structures.

Q. That's right. Then getting back to this picture 69, do I understand that's a picture of you ready to go home after finishing 1062? [536]

A. Say that over.

Q. Do I understand that's a picture of your pick-up loaded up and ready to go home, after 1062?

A. That was it.

Q. It is all by itself in the center of the page, and looked like a finale of 1062.

A. Correct.

Q. Now, commencing with 70 and continuing through to the end of these pictures, do they now relate to job 1068?

A. Yes, these are from 1068.

Q. All right.

A. Number 70 shows a view of the stock of lumber they had on hand in 1068 job yard on December 15, 1944. Number 71 shows my pick-up in front of the only thing they had there at that time to represent an office. Number 72 shows the stock of lumber from the back side, from the back yard.

Q. On what date?

A. These were all taken the same date, the same day, December 15, '44. Number 73 shows the batching plant set up, and cement shed at the stock pile at 1068. Number 74, the same date, shows the saw shed and aforementioned office at 1068. Number 75 is a shot from a little further back, showing the



(Testimony of Patrick L. Darcy.)

entire area of 1068 stock pile, office and yard. Number 76 shows the assembly tables and pile [537] of material behind the office.

Q. On what date was that taken?

A. All these previous pictures, and this down to here were taken on the 15th of December, 1944.

Q. And down to here, you mean including 76?

A. Number 76.

Q. Now, Mr. Darcy, those last pictures to which you have referred with reference to the tables there, and the yard, what was being done at those yards, do you know? A. Nothing.

Q. Did those yards have anything to do with excavations or with the set-up in connection with excavations, if you know, or would it be for making forms?

A. Well, that's where the form panels would be built to go in the excavations.

Q. All right, proceed with 77.

A. Number 77 is a picture of M. C. Schaefer and C. E. Hewitt in excavation number 13, 14, 15, on 1068.

Q. Taken on what date?

A. February 9, 1945.

Q. Number 78?

Mr. Holman: Pardon me; where were they? Where was that?

A. Structure number, you mean?

Mr. Holman: Yes. [538]

A: That was number 13, 14, and 15, on 1068. Number 78 is another picture of C. E. Hewitt and



(Testimony of Patrick L. Darcy.)

M. C. Schaefer in the same structure excavation, different angle, same date.

Q. Now, that is a structure on 1068, I mean an excavation on 1068?

A. Yes. Number 79 shows Mr. McKelvey, Mr. Kelley, Mr. C. E. Hewitt, and Mr. M. C. Schaefer.

Mr. Holman: Just for the purpose of identification, McKelvey was your attorney; who else was there?

A. Mr. Kelley of McKelvey's office.

Mr. Holman: Your attorney's office; who else?

A. Mr. C. E. Hewitt, a licensed engineer from Yakima.

Mr. Holman: Who was he, one of your employees?

A. Yes, on the job at the time.

Mr. Holman: For litigation now?

A. Yes.

Mr. Olson: Well, I object to that. He was there checking for us. We hoped to get it settled at that time.

Mr. Holman: Well, O.K., checking engineer; and who else?

A. M. C. Schaefer, and they are shown in an un-numbered excavation, rough, as the shovel had dug it, on 1068.

Mr. Holman: You can't identify that structure, that excavation? [539]

A. There were no reference stakes left there to identify the excavation by.

(Testimony of Patrick L. Darcy.)

Q. These next pictures are still taken on what date?

A. They were taken on the same date, February 9, 1945. Number 80 shows three forms, that is, three complete forms, on the assembly slab at 1068 stock yard, apparently ready to be delivered to the field. Number 81 shows the rough or partially fine graded excavation at number 12 on 1068.

Q. As it was on what date?

A. February 9, 1945. These next four pictures, down to and including 85, were all taken the same date, February 9, 1945. 82 shows method of assembling forms, 1068 stock yard; 83 shows three structure forms assembled at 1068 yard ready to go to the field; 84 shows a pipe collar section, Macri built form, with a tile block placed in it; number 85 shows one double, on triple, and a double in the background, of assembled forms in the stock yard at 1068 ready to go to the field.

Q. Mr. Darcy, returning to picture number 84, explain how that type of construction differed, if any, from the type of construction followed on 1062 with reference to the installation of the first pipe.

Mr. Holman: Your Honor, I object to that as immaterial, as long as it was not the operations of the [540] plaintiff.

The Court: Overruled.

A. This type of tile block is made of wood, takes a considerable time to cut all the pieces and assemble them, whereas on 1062 an eccentric metal

(Testimony of Patrick L. Darcy.)

cone was used to place between the tile and the inside face of the form, to make the connection of the tile to the structure.

Q. All right, proceed.

Mr. Holman: It sounds here as if you say tile; is that it, t-i-l-e?

A. That's right. Number 86 is form for structure number 73, revised, on 1068, in place, not poured. Number 87 is structure number 66 and 67 on 1068, the last structure poured on 3/5/45.

Mr. Holman: Was that picture taken 3/5/45?

A. That's right. 86 was also taken on that date.

Mr. Holman: Oh, everything before 86 was taken on 2/9? A. That's right.

Mr. Holman: And what was this date?

A. 3/5/45.

The Court: And that is beginning with 85?

A. Beginning with 86. Number 88 shows a double structure—it is a triple structure, number 52, 53, 54, on 1068, which has just been stripped, showing the concrete, unfinished. [541] Number 89 is another view of the same structure from a different angle, showing it more completely. Number 90, end of lateral tile lining outlet, delivery form number 80. Now a series of five pictures taken February 23, 1945, number 91 showing the setting crane in the field at 1068, where the structure is being swung into place, just about ready to turn loose of it. Number 92 is the same thing, with the structure up in the air as it is being swung around by the crane from the truck.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Do you have the station or the structure number?

A. Number 39. Number 93 shows the crane backed up to the flat-bed truck that delivered the form to the field, preparing to lift it off the truck; number 94 shows the crane waiting for the flat-bed truck to back up with the form on. Number 95 is in the yard at 1068, shows the yard crane hooked to a double structure, ready to load it on the flat-bed to go to the field. Number 96—four pictures on this page, all of the same date.

Mr. Holman: What is the date?

A. The same date as the last five I gave you.

Mr. Holman: February 23, '45?

A. Yes. Number 96 is the flat-bed truck with two forms loaded on it, to go to the field. Number 97 shows the [542] stock yard at 1068, with form stock in the yard. Number 98 is a triple structure at 1068 stock yard, ready to go to the field. Number 99 is of the form yard down there showing several forms partially assembled, some fully assembled, some ready to go to the field. That's it.

The Court: I think at this point the record should show that the numbers to which the witness has been referring are sub-numbers of plaintiff's identification 49.

Witness: Your Honor, I have a correction I would like to have shown in the record. In cross-examination a while ago I used one man's name where I meant another one, in reference to ordering lumber. I meant Vern Ashley as Macri's foreman; I referred to Mose Stickney.

(Testimony of Patrick L. Darcy.)

The Court: Now, you're through with the picture part of the examination?

Mr. Olson: I now offer——

The Court: Well, first, let's have cross-examination on the identification.

Mr. Olson: I have some further examination, but not particularly related to the introduction of these pictures.

The Court: Well, let's see, we interrupted cross-examination to identify the pictures. Now let's go ahead with the pictures and have cross-examination on the [543] pictures, Mr. Holman.

Mr. Holman: Before I go on? I haven't finished my cross-examination.

The Court: Well, I understand that. I thought we'll better get the pictures out of the way.

Mr. Holman: May I ask one further question with reference to his voluntary statement?

The Court: Yes.

#### Further Cross-Examination

By Mr. Holman:

Q. During the recess did you talk with Mr. Stickney as to whether or not you had given him that list?      A. No.

Q. You just thought of it, did not have a check made?

A. I checked the record myself.

Q. All right. In any of these pictures which were taken which you have identified, was any representative of Maeri and Company present or notified the pictures would be taken?      A. No.



(Testimony of Patrick L. Darcy.)

Q. Was any notification of any kind given any representative of Macri and Company in advance that the pictures would be taken?

A. Yes, Sam Burnsed and Mr. McCarthy.

Q. What about that?

A. Mr. Sam Burnsed and Mr. McCarthy. [544]

Q. With respect to 1068, or 1062?

A. 1068.

Q. I'm talking about 1062. A. No.

Q. The Court made the rule we were talking about 1062 unless we specified 1068.

A. No.

Q. I move that be stricken.

A. Which?

Mr. Holman: Your Honor, I can save time if I strike the question and the answer.

The Court: Strike the question and the answer, then, the last question and answer.

Q. Mr. Darcy, I'm asking with respect to 1062, was any notice given to Macri and Company in advance of taking any of the pictures covering 1062, so they could be present? A. No.

Q. No writing at all? A. No.

Q. Now, you say with respect to 1068 that you had notified Burnsed and McCarthy?

A. That's right.

Mr. Holman: Those are defendants named in this case, I think, Mr. Olson; didn't you name them as defendants? [545]

Mr. Olson: No.



(Testimony of Patrick L. Darcy.)

Mr. Holman: They were in some cases, but not this case.

Mr. Olson: Well, I haven't named them. They are just people working for Mr. Macri, as I understand it.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you give them any written notice or make any appointment?

A. One written notice.

Q. And was that at the time Mr. McKelvey and Mr. Kelley and the engineer, Hewitt, were there taking pictures?

A. No, that was on the 23rd of February, when I took those other pictures.

Q. Each of these pictures, to the best of your knowledge and belief, show an impartial and fair representation of the condition as found on the ground at the time?      A. That's right.

Q. Now, with respect to 1068, Mr. Darcy, the pictures numbered 70 to 76 I believe you said were taken on December 15, 1944; do you recall?

A. Yes.

Q. And you made the comment with respect to that, that there was nothing being done on those days?      A. At the stock yard there. [546]

Q. Yes. Did you infer by that, did you intend to include in that, that there were no operations being done anywhere on 1068 at that time?

A. No.

(Testimony of Patrick L. Darcy.)

Q. I see; and when you spoke of nothing being done, were you speaking of the crew of Concrete Construction Company, or the Macri crew?

A. Macri operations only.

Q. And what was the situation with respect to the crew of Concrete Construction Company?

A. On 1068?

Q. Yes.

A. We were having nothing to do with it.

Q. Sir?

A. We were having nothing to do with it.

Q. Well, when you say you were having nothing to do with it, you mean you were not working on 1068?

A. No, we weren't on it; we hadn't even been down there, except for me to keep track of operations.

Q. Mr. Darcy, I want to be exact on this. When you say "we" you mean the Concrete Construction Company; is that what you mean?

A. Any operations crew.

Q. Of the Concrete Construction Company?

A. Yes. [547]

Q. All right; was that so by virtue of instructions received—were you on the ground at that time, on the job?

A. You mean when those pictures were taken?

Q. Yes.

A. I was operating on 1062, and had gone on to 1068 to take the pictures.

(Testimony of Patrick L. Darcy.)

Q. Yes; now, that wasn't the day that the engineer reported your crew was waiting for you, was it?

A. That was a couple of days later.

Q. So on this date of December 15, was your crew working?           A. Yes.

Q. And you were taking pictures?

A. For a while.

Mr. Holman: Your Honor, it's pretty hard to get right through the whole 90 very fast, but subject to wanting to refer to a particular picture in cross-examination, that's enough preliminary for me.

The Court: Well, what we're trying to do now is to examine this witness as to the admissibility of the pictures.

Mr. Hawkins: I have no cross-examination, however, I would like to request the witness at this time during the noon hour, if he could select the pictures that show poor excavation, that will facilitate my cross-examination [548] later.

Witness: For that project?

Mr. Hawkins: 1062.

The Court: Do you have any questions, Mr Ivy?

Mr. Ivy: No, your Honor.

Mr. Olson: We offer in evidence, your Honor, plaintiff's identification 49.

The Court: Are there any objections?

Mr. Holman: No objection, as being admitted for the purpose of illustrating the testimony of the various witnesses, your Honor.

(Testimony of Patrick L. Darcy.)

Mr. Olson: Well, of course, we're offering them to show what they show.

Mr. Holman: They speak for themselves.

The Court: Well, it will be admitted, plaintiff's identification 49, which includes sub-numbers 1 to 99 inclusive.

(Whereupon, plaintiff's exhibit No. 49 for identification was admitted in evidence.)

Mr. Hawkins: I wonder if the witness during the noon hour also would refresh his recollection as to the total yardage that was poured out on 1062, and the total number of structures on 1062.

Witness: Total number of structures, and the total concrete? [549]

Mr. Hawkins: Yes. Do you understand that?

Mr. Holman: And would you also, Mr. Darcy, refer to the payroll and tell me whether or not you were entered as superintendent? I asked him previously, your Honor, to check the Concrete payrolls and see if he was at any time—what his listing was, and he hasn't done it, and I want him again to check it. They're here.

Mr. Olson: I'm going to object to the witness testifying. It isn't a payroll he made up. I don't see what it proves in the first place, and I want Mr. Darcy to have lunch here. He's apparently going to be on the stand some time.

Mr. Holman: I don't want to burden him, but I want to save a lot of time handling so many sheets.

(Testimony of Patrick L. Darcy.)

The Court: It doesn't seem to me his testimony about something he didn't prepare or have anything to do with preparing would be admissible, if objected to.

Mr. Holman: I'll withdraw the request.

The Court: The request made by Mr. Hawkins you may do, or such as you have time to do after taking a reasonable time for lunch. I don't want you to go without lunch and work all recess. We'll recess now until 1:30.

(Recess until 1:30 o'clock p.m.)

Yakima, Washington, February 27, 1947,

1:30 o'Clock P.M. [550]

(All parties present as before, and the trial was resumed.)

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Darcy, would you please refer to your record and read the note you entered at the time about notifying or giving Ashley a list of the lumber? You said you had a note, a diary note.

A. Well, I haven't that diary up here.

Q. You said you consulted something and found it was Ashley instead of Stickney, didn't you?

A. Well, I didn't bring it up here.

Q. Well, can you get it here?

(Testimony of Patrick L. Darcy.)

Mr. Olson: Which do you want, Mr. Darcy?

A. The first diary, the one with the silver map on the front.

Q. While they're getting that, Mr. Darcy, was any of the lumber which was furnished by Macri and Company used for the purpose of constructing any sheds or other facilities?

A. Temporarily, yes.

Q. How much lumber, and what type?

A. I don't think I ever listed any footage on it.

Q. Well, give me your best judgment.

A. Approximately 800 board feet of ship-lap, and about 20 pieces of 4 by 4, 12 foot long.

Q. Twenty, 4 by 4, 12 feet; what would that be, roughly? Can you give me the total board feet?

A. Do you mean of the 4 by 4?

Q. Yes.

A. Not without stopping to figure it out. I don't know exactly how many pieces of 4 by 4 we used, right off-hand.

Q. About twenty—well, about a thousand feet of lumber, would you say, or more than that?

A. About a thousand feet.

Q. And was that new lumber?

A. No, it was used lumber.

Q. What do you mean by used; had been used on the structures before?

A. Some of it had been used in structures before; some of it had been used around the yard there, for shed roof, or covering machinery or supplies.



(Testimony of Patrick L. Darcy.)

Q. Yes, but it had arrived on the yard as new lumber?      A. I imagine it had.

Q. I don't want imagination.

A. I wasn't there; I don't know.

Q. O.K. You used lumber once, did you, for jacking up or holding up the Mixomobile, for repairs?

A. We used some lumber at that time.

Q. How much did you use at that time?

A. About 200 board feet.

Q. 200 board feet of what kind of lumber? [552]

A. Stuff that was brought on for shoring, blocking; 3 by 8, I think it was.

Q. And that was used for the purpose of holding up this nine ton Mixomobile while the repairs were being made under it?      A. That's right.

Q. And was that lumber which arrived on the job for the purpose of structure excavation? I should say for forms?

A. Well, not for forms; for shoring, blocking, on the larger structures, up on the turbine lateral.

Q. For what?      A. Shoring; blocks.

Q. Yes, sir, and how long was that used as a support for the Mixomobile?

A. Oh, about three, or part of a fourth day, I think.

Q. Three or four days; yes, sir. You took no picture of that, did you?      A. No.

Q. Did you take any picture of the shed showing the portion that you had built with the form lumber?

A. No. At the time I didn't have a camera.

(Testimony of Patrick L. Darcy.)

Q. And when you were back later, you didn't take any picture of that portion, did you?

A. We took that down a few days after it was built, and returned it to stock. [553]

Q. Sir?

A. We took that down a few days after it was built, and returned it to stock.

Q. Now, is that some of the second hand lumber you were talking about on direct examination, or not?

A. Of what date?

Q. This lumber, was that some of the second hand lumber that you talked about on direct examination? You remember you said a lot of the lumber was second hand, did you not?

A. No, that wasn't part of that.

Q. That wasn't part of that?

A. No.

Q. Then that was new lumber that was used?

A. Some of it.

Q. Would you take that she-bolt a minute, Mr. Darcy, to the stand there? I want to ask you some questions about it, the she-bolt, plaintiff's Exhibit 44. Just sit over at the stand there, will you, so the reporter can get your answers? As you now hold it, it is complete and extended?

A. Yes.

Q. Subject to tightening to hold the walls together, that's right, isn't it? Now, then, will you dis-assemble it so that there is one arm and the cone? All right. Now, do you have a rule?

A. No. [554]

(Testimony of Patrick L. Darcy.)

Q. Have you a rule, Mr. Clerk? Will you please measure the distance from the end—this doesn't come off—from the end to the end of the tapered end of this portion, which is—what would you call this?

A. That is the male section.

Q. All right, of the male section. That's kind of tough to measure that.

A. Eleven and a half inches.

Q. Yes, sir. Now, then, is it or is it not a fact that eleven and a half inches of space would permit the removal of this? If I had twelve inches out here, this could be removed, could it not?

A. Yes.

Q. And does the cone come off with it?

A. No, the cone stays inside the form.

Q. Do you leave that in, Mr. Darcy?

A. No, that is removed after the form is removed.

Q. But is it removed by putting some sort of a lug in there?

A. A wrench fits in that hole.

Q. Oh, I see, it has a square hole in there, and you have a wrench with a square head that fits in there, and you unscrew that?

A. Made to fit that.

Q. And the wrench is also made for about the same over-all length as this, or less? [555]

A. The wrench is about a foot long.

Q. We agreed this was about a foot long, wasn't it?

A. Well, the wrench is a different shape.

(Testimony of Patrick L. Darcy.)

Q. I understand; I'm talking about the overall length; about the same? A. Yes.

Q. O.K. Your Honor, I would like to have a sub-identification, if I may, of this portion of plaintiff's 44.

(Whereupon, a portion of plaintiff's Exhibit 44 was marked Defendant Macri's Exhibit No. 44-a.)

Q. This portion of the she-bolt we've been talking about is now marked 44-a. Now, the she-bolt, 44, including 44-a inserted is, I believe you said, a standard she-bolt you obtained from stock?

A. Yes.

Q. And that is the standard she-bolt used for concrete structures upon reclamation projects, is it not? A. At that time.

Q. I mean at that time, sir. A. Yes.

Q. Was it you who said that the government required the use of that she-bolt?

A. I wasn't there at the time that was made.

Q. All right. Now, would you please, with reference to 25, [556] step over here, Mr. Darcy? Would you remove 26? Thank you. Now, in 25 you spoke of the side walls being at the neat line?

A. These.

Q. Yes. May I have those marked, Mr. Clerk? I want to indicate those two side walls, if I may. Will you point them out, please?

(Whereupon, a portion of Plaintiff's Exhibit No. 25 was marked 25-a and 25-b.)

(Testimony of Patrick L. Darcy.)

Q. Now, with reference to 25a and 25b, you spoke of that as being excavated at the neat line?

A. Yes.

Q. Does that mean—what does it mean? Does it not mean that there was a form set against 25a and 25b, or the dirt was used?

A. The dirt was used to pour the concrete against.

Q. I mis-spoke myself to your Honor when your Honor inquired once if I contended—I forgot about the bottom of the structure; and that is normal practice where there is depression below the floor of the structure?

A. That has to be, where there is a raise from one elevation to the other, where it is impossible—

Q. I say, that is standard practice. Now, with respect to—what do you call these?

A. We call them curtain walls, or sub-walls.

(Whereupon, portions of Plaintiff's Exhibit No. 25 were marked 25-c, 25-d and 25-e.)

Q. 25c and 25d are what you call curtain walls?

A. We call them sub-walls.

Q. Those are put in, are they not, for the purpose of concrete entering to anchor the structure?

A. Not to anchor it; to protect against sub-wash.

Q. Yes, sub-wash, I think that was your testimony; and 2b would run clear to the full length of your model, wouldn't it? A. No.

Q. How far would it run?

(Testimony of Patrick L. Darcy.)

A. To the outside, approximately at this angle, a little bit more where the form would face against that, stopping the concrete here, on the raise of this wall here.

(Whereupon, portions of Plaintiff's Exhibit No. 25 were marked 25-f and 25-g.)

Q. Then it would run approximately just beyond the depression which is marked 25g and 25f; that's right, isn't it? A. Yes.

Q. And the earth itself then would be used, with a form only on the outside that far?

A. Yes.

Q. The form from there on to the side of the model?

A. There is no form out that way. [558]

Q. There is no form?

A. That's where the tile comes through.

Q. Then the structure is not in this part at all?

A. No.

Q. And there is no operation required beyond the limits of 25g plus the wall, in the operations of the Concrete Construction Company? A. No.

Q. All right, sir. Is there any operation with respect to 25c or 25d, of the Concrete Construction Company?

A. Except to fill it with concrete.

Q. That's filled with concrete; now, 25e and 25f are braces, are they not, so that the concrete will conform to that?

A. Yes, it is a corner re-inforcement.



(Testimony of Patrick L. Darcy.)

Q. Now, then, 25e and 25f again are places where the earth is used as a bottom?

A. Yes.

Q. Yes; and is there any danger in the preparing of the form, to damage the excavation at 25e and 25f, by the carpenter's movements?

A. Excavations like this, where there isn't room enough to work, there is, possibly.

Q. Well, regardless of whether there is room enough to work or not, is there danger of that being injured by the carpenter's movements? [559]

A. That's the right answer I gave you. In this there is, and in that one there isn't.

Mr. Olson: You're referring to the——

A. 23 ideal, and 25 actual, is what I'm referring to.

Q. With reference to exhibit 25, then, were those 25e and 25f portions damaged by your carpenters?

A. No, they weren't even made when we got there. We put those in ourselves.

Q. Now, in practice, in the field, are those made by the excavator, or not?

A. They are supposed to be made by the excavator.

Q. Are they in practice, or not?

A. I wouldn't know, because I've had no opportunity to check any other operation.

Q. And in practice is it or is it not a fact that 25e and 25d are made or not made in the excavation?

Mr. Olson: That question is objected to, your Honor, unless he's asking if it was the practice of

(Testimony of Patrick L. Darcy.)

Macri and Company in this case to make them. Whether or not it was the practice on some other job is immaterial, because in this case Mr. Macri was to do the excavating.

Mr. Holman: I'm asking as to practice, your Honor, as between the two operations.

The Court: Well, it isn't specifically covered in the sub-contract, as I understand it, who was to do [560] the particular parts of the excavation.

Mr. Olson: I think it is, your Honor, that Marci was to do all the excavating.

Mr. Holman: Your Honor, I merely want to get the factual end of this. I'm not interested in any legal position.

Mr. Olson: Does your question relate to this job, then?

Mr. Holman: It relates to this man's practice.

The Court: I'll sustain the objection to that. If it is covered by the contract it doesn't seem to me the question is relevant.

Mr. Holman: I agree with your Honor's position, but I was trying to get the—all right, I'll withdraw that.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you say on this job, what has been marked 25c, d, e, and f and g were done by you folks?

A. That's right.

Q. By Concrete Construction Company?

A. By Concrete Construction Company, yes.

(Testimony of Patrick L. Darcy.)

Q. And was that done because Macri and Company's fine graders would not return to do it?

A. At the time they apparently didn't have anybody available to send back to do it. [561]

Mr. Holman: I move the answer be stricken, your Honor. My question, I think, is very clear.

The Court: What is the question?

(Whereupon, the reporter read the last previous question.)

The Court: I'll let the answer stand. You asked him the reason.

Q. Why do you say apparently?

A. Because I had requested all these structures that had things wrong, that I had checked, to be corrected. There was a number of them on that lateral, and since nobody was returned to do the work, we had to do it ourselves to keep from waiting a couple of days.

Q. Didn't you say on the stand that both your carpenter crew and the fine graders were working on this structure at the same time?

A. Not this one.

Q. I see; I misunderstood you. Was there any fine grade work on this structure at all?

A. As I said before, all this fine grade work, including these two neat cuts, we had to do, because we couldn't wait for them to get somebody back to do it.

Q. And how long had the excavation stood until you put your forms in it?

(Testimony of Patrick L. Darcy.)

A. From the time they fine graded it until we got there. [562]

Q. How long was that?

A. About three or four days.

Q. In other words, it stood three or four days?

A. Before we got to it with the forms.

Q. Now, do you say or do you not say that the fine graders worked or did not work upon the structure represented by 25—fine graders worked or did not work upon the structure represented by 25 in advance of your placing the structure, 26, in it?

A. They had worked in it previous to us getting there, but it wasn't right.

Q. All right. Did you give any notice as to any of the claimed irregularities in the structure excavation represented by 25? You shook your head, no?

A. I wasn't quite ready to make that answer; pardon me; I was just thinking. The complaint I made was oral, to the operating superintendent of Macri's work.

Q. What do you mean by "forward"?

A. What is it?

Q. What do you mean by "forward" to the suprintendent?

A. I said it was oral.

The Court: Made orally.

Q. Orally? A. Yes.

Q. When? [563]

A. Whatever day the record shows we started to work on this would be the day that I had found him and told him the excavation was wrong.

Q. And who was that superintendent?

(Testimony of Patrick L. Darcy.)

A. That would be Sam King.

Q. Sam who? A. King.

Q. And the structure is what?

A. 427-428.

Q. When you say sub-fillets would you identify those?

A. That is what you had marked e, f and g.

Q. Thank you. Now, if you'll take the stand. At the time you took the photographs, February 23, 1944, and in—I think that's the last date you took photographs, wasn't it—and March; February 23 and March 5, February 9 with respect to 1068, you were informed, had been informed, that Macri and Company had served formal notice upon Concrete Construction Company that their contract was terminated for non-performance, had you not?

A. I knew that we had been notified that they were going to take over.

Q. That they would take over as of the date of January 3, you knew that, didn't you?

A. Approximately there.

Q. So when you answered that you did not go on to that job [564] at all, you did no work after getting the notice that the job was terminated?

A. No.

Q. And that would hold also, of course, for your picture of April 8; there is one picture of April 8. Now, with reference to excavation 294-A, in which in identifying the picture you said that it showed the structure in the condition Macri left it, square hole, entirely dug by hand, six inches larger than the actual concrete of the structure—correct?

A. That's right.



(Testimony of Patrick L. Darcy.)

Q. Did you call Macri's crew back to fine grade that, or not? A. Yes, I did.

Q. And who did you call?

A. James Black, in charge of fine grading.

Q. James Black; and did he fine grade it?

A. Yes, it was enlarged so we could get the form in it.

Q. Then, when you took this picture, had it been enlarged, or not? A. Not yet, then.

Q. But you didn't take any picture after it had been enlarged to show the correct fine grading?

A. No, because it was a foggy day, and I couldn't get a picture of it.

Q. Oh, that's the fog picture that you didn't put it? [565] A. Yes.

Q. May I have that for identification, please?

The Court: What is the number that you're talking about now, Mr. Holman?

Mr. Holman: It hasn't been identified.

The Court: No, I mean the one you just got through with.

Mr. Holman: 49-6, your Honor. Will you mark this for identification, Mr. Clerk, Macri's sub-number, if you can?

The Court: Sub of this one?

Mr. Holman: Yes, that will be all right with me.

The Court: I don't think it could be marked as a sub of 49, because 49 is all plaintiff's. Mark it Macri's.



(Testimony of Patrick L. Darcy.)

(Whereupon, photograph taken by Darcy was marked Defendant Macri's Exhibit No. 50 for identification.)

Q. Handing you what has been marked Macri's 50, is that the photograph you say you attempted to take, but on account of the fog you couldn't take it?

A. That's it. It is marked upside down.

Q. Sorry, Mr. Clerk. That's one on you. Counsel, will you kindly hand me the prior book with the indorsement below that, made by Mr. Darcy? This one? I'm calling your attention to the indorsement you made below that picture [566] when it was taken; I'll read it: "Fog on project, daytime; 35 feet from camera two men were working setting forms." Did you make any memo at all that you tried to photograph this structure, and didn't?

A. No.

Mr. Holman: I offer in evidence identification 50, and I would like to have marked for identification—could you come here again, Mr. Olson? I would like to mark for identification, your Honor, this portion of the page which I've marked with pencil, and ask the Clerk to detach it from the rest.

The Court: Any objection to cutting that portion out, Mr. Olson?

Mr. Olson: None whatever.

The Court: Just cut that part out, and you won't have to bother with the rest.

(Testimony of Patrick L. Darcy.)

The Clerk: I'll mark that as 50-a, then I'll attach the picture right on it.

(Whereupon, Legend by Darcy re photograph (No. 50) was marked Defendant Macri's Exhibit No. 50-a for identification.)

Q. Let me have it before you attach it. Handing you what the Clerk has marked as 50-a, do you recognize that as the portion of the page I showed you when interrogating you just ahead of it being marked? [567] A. That's it.

Mr. Holman: I offer Macri's 50 and 50-a in evidence, your Honor.

The Court: Admitted.

(Whereupon, Defendant Macri's Exhibits No. 50 and 50-a for identification were admitted in evidence.)

Mr. Holman: That's all.

#### Cross-Examination

By Mr. Hawkins:

Q. With reference to Exhibit 23, Mr. Darcy, that is the model over there, you haven't shown the dirt piles on that model, that would result after the excavation has been completed?

A. You mean the one to specification?

Q. Yes.

A. The dirt should be piled back far enough out of the way so that a man would be able to work around the banks without kicking it in the hole. Naturally it wouldn't be shown there.

(Testimony of Patrick L. Darcy.)

Q. It would be beyond the border line of that box, is that right? A. Yes.

Q. That dirt is loose, is it not?

A. What is it?

Q. That dirt is loose when it is piled out like that? [568] A. Yes, it is quite loose.

Q. If the wind blows, it blows the dirt around?

A. More often it is lumpy, but not loose; it is easy to kick it around.

Q. And it would be kicked into the hole?

A. That's right.

Q. And if you delayed three to five days after the form was excavated until you came along with the forms, that hole might get filled up, to a certain extent? A. If the dirt was dry.

Q. You built those models to the scale of 15/100 on the model, against one inch, on the model?

A. Well, it was 15/100 of a foot. I didn't get down quite that fine.

Q. Can you tell us what an inch on the model equals, out on the actual site? One inch on the model would equal what on the site? Can you figure that for us?

A. Approximately 1 and 20/100 of a foot.

Q. 1 and 20/100 of a foot? One inch equals 1.2 feet? A. Wait a minute; no.

Mr. Holman: Your Honor, while they're computing, the Clerk just called my attention to the fact I had not offered 44-a, part of the she-bolt. I do offer that as an exhibit.

(Testimony of Patrick L. Darcy.)

The Court: I think we had it marked as a sub-identification?

Mr. Holman: Yes.

The Court: Well, it may be admitted.

(Whereupon, Defendant Macri's Exhibit No. 44-a for identification was admitted in evidence.)

The Court: Wouldn't it be 1.8 inches to the foot? I just want to save time, counsel. What I say isn't binding.

A. Approximately. Did you want inches to feet?

Q. One inch on the model indicates one foot and how much of a foot on the field?

A. Approximately .78, or 8/10.

Q. Of an inch, or a foot? A. Foot.

Q. In other words, one inch on the model equals  $17/8$  feet?

Mr. Olson: No, he said it equals .8 of a foot.

The Court: 15/100 of a foot would be 180/100, or 1.8 inches to the foot, wouldn't it? I'm not an engineer, but it seems to me that would be the computation.

Q. When you have a half an inch on your model, how many inches does that equal?

A. What do you say?

Q. When you have a half inch on your model, what does that equal on the field? [570]

Mr. Olson: Now, if your Honor please, I think if it is broken down into inches, if we're going to go into half inches, and then quarter, it is all mathematical computations; I don't see the purpose of breaking it down.

(Testimony of Patrick L. Darcy.)

Mr. Hawkins: The point I'm getting at is simply this; the 2 by 4's are half an inch, actual size, on the model—now, if one inch equals 1.8 feet—is that right? I'm not just clear; if you have one inch on the model, what does that equal in the field? I just didn't get it. A. 8/10 of a foot.

Q. So if you have a half an inch, that's 4/10 of a foot? A. Yes.

Q. And you have your 2 by 4's or strongbacks square at a half an inch.

A. Well, they vary a little bit. Anything that small, you get a little bit of variation in cutting. They weren't finished.

Q. In other words, that model is not finished accurately to this 15/100 scale you're speaking of?

A. It's close enough to that scale you can't detect any variation.

Q. Well, a half inch doesn't represent the broad side of a 2 by 4?

A. Sufficiently for the purpose of reproduction in that scale.

Q. In your opinion, is that right? Did you check the number [571] of pictures that showed what you claimed were poor excavations? Can you give us the number of those pictures?

A. Do you want this list?

Q. Just read it off as you prepared it.

A. Picture number 25 and 26—or picture number 1; it is structure number 25 and 26.

Q. (By Mr. Olson): Just give us the picture numbers.

(Testimony of Patrick L. Darcy.)

A. All right; pictures number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 33, 35, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 67, 68; on 106.

Q. Now, there is some over-lapping there, isn't there? I mean you have more than one picture of the same excavation, isn't that right? A. Yes.

Q. How many different structures are involved in those pictures? A. 46.

Q. 46 different structures?

The Court: Do I understand that all of these are on 1068, all of the numbers?

Q. 1062 only.

The Court: 1062?

Q. Isn't that right, Mr. Darcy?

A. Yes.

Q. Now, then, do you know the total yardage of concrete [572] poured on 1062 by the Concrete Construction Company?

Mr. Holman: Object to that. your Honor, as immaterial, as not the best evidence. The best evidence would be the pay quantity by the Bureau, determinative upon all parties under the contract.

The Court: Well, if this witness knows, I'll permit him to answer. A. We poured 1572.47.

The Court: Give me that figure again, please.

A. 1572.47, not including one day's batching that we did ourselves.

Q. What do you mean by that?

A. We operated the batching plant, from where we got our aggregate supply. The owner and op-



(Testimony of Patrick L. Darcy.)

erator didn't have a man to operate, and we had to operate it ourselves, and we had no record of that day's batching, that is, that I had time to look up.

Q. That batching is not charged, is it?

A. No, that batching wasn't charged for that day.

Q. Now, yesterday I believe you testified as to the difficulties you had with the type of excavation exemplified by exhibit 25, and explain to the court how much easier it would have been had the excavation been as indicated by exhibit 23. Now, then, your testimony yesterday as to how much easier it would have been is [573] based upon an excavation similar to excavation or exhibit number 23, is that right?

A. Will you please repeat that one?

Q. Surely. Yesterday you testified that you had difficulties with the type of excavation such as exhibit 25?

A. Yes.

Q. And you explained to the court how much easier it would have been had you had the excavation exhibited by exhibit number 23?

A. That's right.

Q. And your testimony in that regard is based upon an excavation that is made exactly like number 23, is that right?

A. Not exactly like it, but sufficiently near to that.

Q. Substantially the same as 23, is that right?

A. Yes, to what these specifications call for.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I move that be stricken, your Honor, as a conclusion of the witness.

The Court: You mean what the specifications call for?

Mr. Holman: Yes.

The Court: Yes—well, I think that's what we're talking about, on the model drawn to the specifications, or his idea of them.

Mr. Holman: Yes, his idea.

The Court: Well, it is still his idea. I'll [574] overrule the objection.

Q. (By Mr. Hawkins): Your testimony is based on an excavation substantially similar to Exhibit 23?      A. That's right.

Mr. Hawkins: I think that's all, Mr. Darcy.

#### Further Cross-Examination

By Mr. Holman:

Q. One more question, Mr. Darcy. In answer to counsel, you gave the total yardage poured; poured, did you      A. Yes.

Q. Of 1572.47?      A. Yes.

Q. In the event that the final estimate of the government as to pay quantity shows a total of 1356.697 cubic yards, what is your explanation for the difference?

A. That was consumed in over-run, filling voids that was over-excavated.

Q. Are you giving me an amount at the mixer, or the amount as poured?

(Testimony of Patrick L. Darcy.)

A. I'm giving you the amounts that were screened at the bunker.

Q. Screened by whom?

A. By the bunker operators.

Q. Yes; in other words, you're giving me that at the the bunker, then there is spillage. is there not, in the field?

A. You mean of the concrete? [575]

Q. Yes.

A. As registered on the report of the Bureau of Reclamation engineers, which only showed two occasions there was any spillage, less than a half yard.

Q. Then you say that regardless of the quantity measured by the government as completed concrete structures, the actual quantity poured was 1572.47?

Mr. Olson: That question is objected to, your Honor, because the Bureau of Reclamation didn't measure the quantity of concrete poured.

The Court: Well, I think he's already explained it. He said it was overage, to fill holes that the Bureau didn't pay for.

Mr. Olson: Then I object to the question being argumentative.

Q. Does that include or exclude spillages?

The Court: He said that it excludes spillages, didn't he?

Witness: No, it would include what little spillage there was.

Mr. Olson: Which was how much?

A. According to the inspector's report, there

(Testimony of Patrick L. Darcy.)

was less than a yard reported in spillage, altogether.

Mr. Holman: I move that answer be stricken until the witness identifies the report. [576]

A. All right, there was less than a yard of spillage or waste.

The Court: The reference to the report may be stricken. It isn't identified or referred to specifically.

Mr. Holman: Thank you, that's all.

### Cross-Examination

By Mr. Ivy:

Q. Mr. Darcy, I believe that you stated that this job 1062 could have been completed in three and a half months? A. Yes.

Q. That's by the Concrete Construction Company? A. Yes, our part of the work.

Q. Were you on this job from its inception, 1062? A. No.

Q. You went on there in June, did you?

A. 29th of June, 1944.

Q. And you were there until April 10 or so, when the job was completed?

A. April 8 I left.

Q. And from a date in June to April you were the one that turned in the time records, were you?

A. Not until the 8th of August did I turn in a report.

Q. And from about that time, then, you made the reports to the Portland office of progress on the job, time records, and expenses? A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Did you segregate in those reports any of the items that you had complained of regarding the work that was performed under the direction of Concrete Construction Company that Macri Company was supposed to have done?

A. Yes, on those reports there is a record of it, that they have at the main office.

Q. Did those reports show the time that you yourself spent on 1068?

A. The reports show every time that I was down there, and how many hours of time I spent there.

Q. The excavation that you spoke of with reference to the model, 25, was performed by Concrete Construction Company men, is that true?

A. Yes.

Q. And it's your understanding that should have been performed by Macri?

A. That's the fine grading, yes, and it should have been done by the Macri crew.

Q. What about the excavation?

A. The rough excavation, no.

Q. How about the trimming up?

A. They had made an attempt to do it, and it was wrong. We had to finish it out correctly ourselves.

Q. And that was their job?

A. That was their job. [578]

Q. And squaring up was their job?

A. Yes.

Q. Bringing to the proper level?

A. Proper elevations in all sections.



(Testimony of Patrick L. Darcy.)

Q. Did you keep track of the hours that were wasted by the carpenters in January and February, that you testified to?

A. There's a record of every hour every man put in, and what he did.

Q. There would be a record, then, of the time put in by carpenters doing nothing?

A. Well, it would be charged not as doing nothing, but as to field operations, some of it is actually marked for kill time.

The Court: I take it, then, there isn't any separate record of time when they didn't work, is that right?

A. Just occasions when it was definitely segregated it will be marked kill time on the time sheet.

Q. So the only segregation would be the reference to kill time, that is definite in your reports?

A. As to which?

Q. As to kill time?           A. Yes.

Q. Now, will you relate again the specific items of work performed under your direction that you were complaining to [579] Macri's superintendents about not doing themselves?

A. Fine grading, cribbing, back fill, setting the tile into the structures, and some of the road work we had to make to get into certain places, back filling some of the ditches to get the equipment through, and a few excavations we did, general excavating by hand, we dug sub-wall trenches, we cut sub-fillets out, that would be included in your back filling—I mean your fine grading: right at this minute that's all I recall.



(Testimony of Patrick L. Darcy.)

Q. And were there any times when there were delays in your operations by reason of Macri's failure to do certain work?      A. Yes.

Q. Now, on all these matters that you've just testified to, did you make any notations or segregations indicating the man-power lost or the hours that were charged for that?

A. That's all on the time manifests.

Q. And specifically designated?

A. Designated as whatever heading it comes under.

Q. No, Mr. Darcy, I don't believe you're getting—you understand what I'm asking you; in making up your reports to your Portland headquarters did you specifically designate on those reports the amount of time or the amount of wages that were lost by reason of these matters you complain of, as far as Macri and Company are concerned? [580]

A. That's what I meant; excavating would be under the heading of excavating, every man, so many hours, whatever time he put in, whatever he was doing, is reported as such for the time he was doing it, on every report.

Q. So there's a way of going through your payroll records and fixing the amount of time chargeable to the delays and breach of contract by Macri?

A. That's right.

Mr. Ivy: That's all.

Mr. Hawkins: I have one further question, your Honor, on cross-examination.

The Court: All right.

(Testimony of Patrick L. Darcy.)

Further Cross-Examination

By Mr. Hawkins:

Q. In all of these pictures that you took, do you have any pictures of any of your men doing the finish grading? A. No, I haven't.

Mr. Hawkins: That's all.

Further Cross-Examination

By Mr. Holman:

Q. How many structures altogether were there, Mr. Darcy?

A. 549, including 28 standard weir walls.

Q. And you took photographs of how many? 46, I believe you said.

A. 46 I believe was what we counted.

Q. Did you take any photograph of any one where you claim the excavation was done right?

A. What did you say?

Q. Did you take any photograph of any one where you claim the excavation was done right?

A. There wasn't any to take.

Q. Will you answer my question, yes or no?

A. No.

Mr. Olson: I think he did, your Honor.

Q. Did you take any picture of any structure where fine grading was done right?

A. Not of the fine grading.

Q. You did not?

(Testimony of Patrick L. Darcy.)

A. I took the picture of the structure showing the exterior.

Q. I'm talking about the fine grading.

A. No.

Q. Did you take any picture of any structure showing fine grading as done by Macri, and then take another picture showing fine grading as done by your crew, after Macri's fine graders had left it?

A. No.

Mr. Holman: That's all.

The Court: All right; any redirect?

Mr. Olson: Yes, your Honor. When I put those pictures in I had withheld some examination with reference to 1068 until I got those pictures in.

### Redirect Examination

By Mr. Olson:

Q. Now, Mr. Darcy, with reference to job number 1068, I gather from those pictures that you were there on December 15, 1944?

A. Which one was that, 1068?

Q. 1068, you were on that project?

A. On December 15?

Q. Yes. A. Yes.

Q. And what, if anything, did you do on 1068 with reference to inspection or otherwise going over 1068?

A. I just run down across a few laterals at the upper end, and down through the middle of the project, watching for any sign of operations, went down to the stock yard or the stock pile where the

(Testimony of Patrick L. Darcy.)

base or headquarters was to be established, checked in there to see what was there and what was being done.

Q. Did you know that prior to that date Mr. Schaefer had received a letter, which is in evidence, directing you to proceed with your structure work on 1068?

A. Yes, he had called me and told me that he had received the letter.

Q. I wanted to know if you knew about it.

A. I knew of it.

Q. And were there any excavations ready for placement of structures on 1068, on December 15, 1944? [583]

A. No, there were not.

Q. Were you aware or advised that Macri and Company had held the Concrete Construction Company in default on job 1068 by a letter written January 3, 1945, which is in evidence?

A. Yes.

Q. And did you subsequent to January 3, 1945, again go down to 1068?

A. Yes. I did.

Q. On what date?

A. The 5th of January.

Q. 1945?

A. '45.

Q. And were there on that date any excavations which were ready for structure placement?

A. No, there were none ready for structures.

Q. Were there any excavations there at that time?

A. There were about nine or ten rough excavations, that is, there were rough excavations for about nine or ten structures.

Q. And had they been fine graded?

A. No fine grading whatever.

(Testimony of Patrick L. Darcy.)

Q. So that could the Concrete Construction Company have placed any concrete structures or forms in those excavations up to and including January 5, 1945?

A. No, it would have been impossible. [584]

Q. And when did you next go on 1068?

A. January 9.

Q. Did you examine the excavations on that date? A. Yes.

Q. And were there any excavations then completed with fine grading and ready for installation of structures?

A. There were none completed until in February.

Q. Do you recall whether or not on that date Macri and Company were themselves preparing any of the structure forms?

A. I think they were starting to build some, or it looked like on the table some of the panels; they had established the yard and the decks that they were to work on, and a tool shed, and they had parts of panels on the table working on them at the time I was there.

Q. And when did you next go on 1068?

A. January 21.

Q. And what was the excavation situation on that date?

A. Well, they had a few more rough holes, but no fine grading.

Q. Were there any excavations on that date which were ready for placement of structures?

A. No, there weren't.

(Testimony of Patrick L. Darcy.)

Q. And what was Macri and Company doing, if anything, on that date with reference to building of the structure [585] panels or forms for 1068?

A. By that time they had built quite a few panels, and assembled a few simple forms, complete forms, in the yard on the assembly decks, ready to be hauled out on the field.

Q. Now, were you on 1068 again in January?

A. The next day, January 22.

Q. Did you examine the excavations on that date?

A. I think that's what I went down there for, was to see if they were starting the fine grading crew that morning, because that was the date the fine grading crew was supposed to move down there. Whether they did or not I couldn't find out.

Q. What was the condition on that date?

A. I couldn't find any fine graded, or anybody to do fine grading.

Q. What was the condition of the slopes of the banks of these excavations up to and including January 22, 1945?

A. Well, they were just as the bank would be if excavated by a hoe, a type of shovel, which is practically vertical.

Q. Now, when did you next go on 1068?

A. February 5.

Q. And what did you see on that date?

A. Fine graders were then working down about —oh, the ninth or tenth hole down on the first lateral. [586]



(Testimony of Patrick L. Darcy.)

Q. And what was going on in the yard, if anything, on 1068?

A. Well, the construction and assembly of forms in the yard.

Q. When was the next day you were down there?

A. February 7.

Q. Did you examine the excavations on that date?

A. Yes.

Q. And what did you observe?

A. Up to about number 10, and one in the east turbine lateral, seemed to be completed as to fine grading, and the yard was still under the production of form panels and parts assembling.

Q. And what was the condition of the excavation banks?

A. They were more vertical than the shovel had left them, or the hoe.

Mr. Holman: May I have that answer?

A. They were more vertical than the hoe had left them.

Q. And when were you on 1068 again?

A. February 9.

Q. And what did you find with reference to the excavations or structures on that date?

A. I think the fine graders then were down about 17 or 18; fine grading was still the same, it looked, and a couple we checked were accurate at the bottom, but the banks were still vertical on the sides, and very close to the outside, that is, the neat line of the concrete structure. [587]

(Testimony of Patrick L. Darcy.)

Q. That's the date that you testified, I believe, that Mr. McKelvey and Mr. Hewitt went over with you?

A. Yes, that's the date.

Q. Now, when did you go over the project again, if you did?

A. February 11.

Q. What was the situation with reference to the excavation and structure placement then?

A. They were as they had been two days before, with the exception of one or two holes that had been worked on, but didn't seem to be complete. The tools were still in the hole.

Q. Had there been any structure forms placed in the excavations?

Mr. Holman: Mr. Reporter, may I have the last answer?

Reporter: There wasn't any.

(Whereupon, the reporter read the last previous question.)

A. On February 11. No, there hadn't been.

Q. Counsel asked you on cross-examination if the Mixomobile was on the job, I believe, on June 29?

A. Yes, he did ask that.

Q. And you said it was not?

A. It wasn't.

Q. Why wasn't it? [588]

A. Because there wasn't sufficient progress ahead to guarantee that we would be able to function or operate economically right on through without having a long extended tie-up of such equipment.

(Testimony of Patrick L. Darcy.)

Q. Do you know how much work was then available for concrete pouring equipment?

A. Approximately two days' pour.

Q. Your equipment was then in Portland?

A. Yes.

Q. For the purpose of the record, Mr. Darcy, about how far is Portland from this job?

A. From the job there?

Q. Yes. A. It is 192 miles.

Q. Do you know how many days' concrete pouring you had ahead when you did bring up your machinery and equipment?

A. Approximately six days' pouring ahead, but enough forms out ahead to keep—we had a fairly reasonable assurance of being able to operate more or less continuously from there on, if things were to come through as oral agreements and progress at the time seemed to warrant.

Q. Now, counsel also asked you, Mr. Darcy, if there ever was a time when all of the lumber in the yard had been made into forms, and I believe you said no. Would you explain that? [589]

A. Well, there would be times that one type of lumber that would be used on forms, we wouldn't have the other type of lumber to go with that type to make forms. You can't use one dimension of lumber without the other dimension of lumber.

Q. Were there times, then, when you were entirely out of two by fours?

A. The majority of the time we were out of two by fours. When we did get two by fours they

(Testimony of Patrick L. Darcy.)

were nowhere near enough to fill the necessity, and they didn't last but just a little while.

Q. And were there times when you were entirely out of other types of lumber?

A. Then there were times when we might have a few two by fours, but we would be entirely out of ship-lap.

Q. And was it possible to make these forms without having on hand all four types of lumber?

A. I don't know how it would be done, no.

Q. Now, counsel has offered and the Court has received in evidence a picture that we might term the "fog picture," defendant Macri's Exhibit 50, and a notation below it that says defendant Macri's Exhibit 50-A. Are you able, Mr. Darcy, to explain the notation which appears on the bottom, the notation which appears as defendant Macri's Exhibit 50-A, with what I understood your testimony to be [590] that some men were in this hole excavating?

Mr. Holman: Objected to as leading, your Honor.

The Court: Well, in connection with his testimony; let's leave it there.

Mr. Olson: I asked if he can explain it. I don't know how that can lead him. Maybe he's going to say he can't explain it.

Mr. Holman: Well, we don't want counsel testifying.

Mr. Olson: I don't know what it's going to be.

(Testimony of Patrick L. Darcy.)

The Court: Can you answer that?

Witness: Well, if he wants me to explain the answer I gave to the question that was asked, my sole purpose in taking this picture was to have another picture of the same hole, showing that the side banks of this excavation were still extremely close to the structure and entirely vertical, but it is just one picture that I intended to have that I didn't get on account of elements.

Q. Well, as I understood counsel's question, at one time you said there was excavators working in the hole, and another time you said there was structures being put in the hole. I didn't understand it that way. Did I misunderstand that?

Mr. Holman: I challenge that, Mr. Olson. I don't think I said any such thing. [591]

Mr. Olson: I understood this witness said at one time there were excavators working there, when the picture was introduced, and then produced this album wherein he said it was the structure. Maybe I remember wrong. I don't want to waste any time on it.

A. The carpenters were preparing their forms to go in the hole here at the time I took the picture, but as I testified, they had returned and supposedly corrected the excavation. The fine graders weren't there.

Q. Now, Mr. Darcy, did you have foremen working under you? A. Yes.

Q. And I'm not asking for their identity, but as to the type of foremen, what foremen did you



(Testimony of Patrick L. Darcy.)

have with reference to the placing of concrete structures?

A. Yard foreman—placing of structures?

Q. Yes.

A. The only foreman I had under me that would be considered as a foreman was the yard foreman in preparation of panels for the structures. In the field they would just be considered as lead men.

Q. Lead men? A. Yes.

Q. And how about on the concrete crew, was there any foreman?

A. Yes, there was a foreman on the concrete crew. [592]

Q. Now, on cross-examination you said there was some lumber used in a shed, but the shed was taken down and the lumber returned to stock. What did you mean by lumber returned to stock?

A. Put right back on the pile in the yard where it had been taken from, and then consecutively used for form work.

(Whereupon, Graph made from time cards and daily reports was marked Plaintiff's Exhibit No. 51 for identification.)

Q. Now, showing you plaintiff's identification 51, Mr. Darcy, I'll ask you first who prepared that?

A. I prepared this.

Q. Would you state what it is?

A. It is a graph in code color showing every day of operation on 1062, every man employed on that day, and in code color what that man did on that day.



(Testimony of Patrick L. Darcy.)

Q. And each one of the little squares here represents what?

A. Each little square is a man day.

Q. Now, I notice certain graphs or lines going from the bottom part of the identification upwards.

A. Here?

Q. Yes. What do they indicate, in different colors?

A. They indicate the planned time of start and finish of each operation of the work that we were to do.

Q. And the planned time, how would that time correspond with [593] the time that it would take to properly complete this job if the excavations were made proper, lumber furnished on time and the proper quality, and the excavations made so that you could proceed with your work?

Mr. Holman: I object to that question as an improper question based upon assumptions that have not been established.

The Court: Will you read the question?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: My point, your Honor, is if he says "as you have stated" or something so he ties it to this witness, but counsel is making a general summary based upon assumption of the evidence up to this time. In other words, if counsel means if the banks had been on a one to one slope and certain features, that's all right.

(Testimony of Patrick L. Darcy.)

Mr. Olson: Well, I'm willing that the question be tied in with what Mr. Darcy has related as proper excavation.

Mr. Holman: I was objecting to this summary of the evidence to date.

Mr. Olson: I have no objection to it being tied in with what Mr. Darcy has said was the proper excavation.

The Court: It would necessarily have to be tied to this witness anyway, because it is his graph and his [594] idea of what it would be.

Mr. Holman: The only objection I had was counsel's statement making a summary of the Court's ultimate conclusion.

Mr. Olson: I'll further state the purpose of going into this exhibit, if it will assist the Court and counsel any.

The Court: Well, you might proceed with your identification.

Q. Do you have the question in mind?

A. Reporter, would you read that?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: That I understand is according to his testimony, Mr. Olson.

Q. And using the proper excavations as you have indicated in your testimony that they should be?

A. Well, based on past experience, relativity of operation comparisons, it would have come out

(Testimony of Patrick L. Darcy.)

very closely to what we had planned there, and that's what that mark was intended to be. When we take a job we figure our time, and with this exception we always hit that time for completion of the work.

Mr. Holman: I move that the answer be stricken, your Honor, as based on speculation and based on conclusion [595] of the witness, who is not testifying as an expert, but as a factual witness.

Mr. Olson: This witness is testifying as an expert.

Mr. Holman: If as an expert, it should be upon a hypothetical question.

The Court: I'll grant the motion to strike, in the form that the answer was made here.

Mr. Olson: Does that strike the entire answer?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: That certainly has no place in here.

The Court: The whole answer will be stricken.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Well, Mr. Darcy, you show on this—let me ask you first, Mr. Darcy, what do these vertical lines in the different colors, what do they show?

A. They show what would have been the ultimate result of completion of this work, that is,

(Testimony of Patrick L. Darcy.)

from beginning to end of each operation as based on our estimate for that work.

Q. Now, I'm asking you if the holes had been excavated with a lateral clearance at the foundation of the structure of one foot out, and the banks from there to the surface to a one to one slope, and if the excavation had been made rapidly, and far enough ahead of you so that you [596] could have proceeded with your operations without being delayed by lack of excavations, and if you had been furnished with lumber on time and of a proper quality so that your operations would not have been delayed, could you then have completed your various forms of work as shown by these lines that are on the left hand portion of the identification 51——

Mr. Holman: Just a minute, Mr. Darcy.

Q. ——and going from the bottom portion of the exhibit to the top?

Mr. Holman: I submit, your honor, that counsel starts out asking this witness a question based upon assumptions he's using, and then he winds up tying it to this witness upon this exhibit. If he's asking this witness a hypothetical question, it has to be based upon assumptions, and if he's asking a factual question, it has to be based on this witness' testimony, or some testimony in the case.

The Court: This witness has testified as to what the difference would be in time consumed, as I recall, if the structures had been accord-

(Testimony of Patrick L. Darcy.)

ing to his conception of what the specifications said, and what they actually were. Now, he's putting it in the form of a graph. If you want to put it in the form of a graph to illustrate the testimony of this witness, I'll permit it to be [597] introduced.

Q. Is this a graph explaining or illustrating the testimony you have already given as to the time in which this job could have been, and as you testified, should have been completed, as against the actual progress of each type of work?

A. That's right.

The Court: The court will recess now for ten minutes.

(Short recess)

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, before proceeding, I have distributed to various counsel the amendment made to the answer and cross-complaint, as per stipulation, and with your Honor's permission I would like to have the amendment made in the original pleading by the Clerk. It would be substituting for pages 6 and 7 pages numbered 6a and 7a.

The Court: Is there any objection?

Mr. Hawkins: Is that in accordance with the stipulation?

Mr. Holman: The exact wording.

The Court: That amendment may be made.



(Testimony of Patrick L. Darcy.)

Mr. Holman: For pages 6 and 7, will you [598] substitute pages 6a and 7a?

Mr. Olson: If your Honor please, we offer in evidence plaintiff's identification 51.

Mr. Hawkins: We object to the introduction of this exhibit in evidence. Counsel stated that this graph purports to summarize the testimony of the witness. I submit that it does considerably more than that. It sets forth on each day the number of men that were working and the jobs that they were doing and the hours spent, and there has been no testimony of that kind whatsoever. This witness has testified generally that he was delayed, that the excavation work was not done properly, and that had it been done properly, according to his lights, it could have been done much faster. It is true that portion is set forth in this graph, but it is in detail, day by day, and also has this additional information along the foot of the graph. I submit it is not in any respect a summary of the witness' testimony. It purports to be evidence in and of itself of facts not testified to yet; and I also object on the ground that this exhibit is not the best evidence. It purports to be a summary or graph from the records, which has been prepared from the records of the Concrete Construction Company, and those records as yet are not in evidence, and those records, of course, would be the best evidence [599] as to what men worked on what job, and so on. For that reason we object.

Mr. Holman: I join, your Honor.



(Testimony of Patrick L. Darcy.)

Mr. Olson: Your Honor please, this does not show what men worked on what job. It does illustrate how many men were working in the yard, and how many men were working at concrete, and how many men were working at the structures, and on what days, and it is illustrative of this witness' testimony, showing that the job was carried away beyond the time within which it should have been completed. It seems to me that it is of assistance not only to the Court but to both sides of this case if they want anything about the man power that was on this job.

The Court: Well, the difficulty is that the manpower that was on the job on different days, at least throughout the whole operation, wouldn't be within the personal knowledge of this witness, even though he could testify to it directly if he had that knowledge. I assume what he's done here is to make this graph from the records of the Concrete Construction Company made up on the job, I suppose the payrolls and daily reports and whatever other data he may have used. It is my understanding that where records or documents are very voluminous or complex, and if they're available to both [600] parties, then a competent witness may go over them and make a summary or compilation of what they show, and that will be admissible in evidence, but he hasn't shown just what was used here as a basis for his computation of the man days on the job, and the number of men at those particular times, and it isn't shown that

(Testimony of Patrick L. Darcy.)

those records are available here. I think I'll have to sustain the objection at the present time.

Redirect Examination  
(Continued)

By Mr. Olson:

Q. Mr. Darcy, with reference to that portion of this identification 51 which purports to show the number of man hours being spent on this job on a specific date, and doing specific work, from where or from what records, if any, did you get the information which you have graphically shown on identification 51?

A. The daily operation reports and the time cards from the work on the project.

Q. Is that information available from the payroll reports of the Concrete Construction Company, certified copies of which were sent in to the Bureau of Reclamation?

A. Not in that full a detail.

Q. Beg your pardon?

A. Not in that full a detail. On the certified transcript of payroll they're only registered as a carpenter, or a laborer, or a classification of whatever various type it [601] was.

Q. In other words, from the payroll you can't tell whether they were setting structures out in the field, or whether they were working out in the yard?

A. No; only from our payroll reports.

(Testimony of Patrick L. Darcy.)

The Court: Where are the records and documents from which your graph was prepared?

A. We have most of them right here with us.

Q. Well, is there any we don't have?

A. The time cards, truck reports, mechanic's reports, and all the rest of them are down there in one of those cases.

The Court: I didn't get the significance of the last answer as to where they were.

A. In one of those suit-cases down there.

The Court: I thought you were talking about a law-suit.

Mr. Olson: Could you just step down and get them, Mr. Darcy?

(Whereupon, Daily reports made by Superintendent on job were marked Plaintiff's Exhibit No. 52 for identification.)

Q. Mr. Darcy, handing you plaintiff's identification 52, I'll ask you what that is?

A. That is the daily manifest of the daily time, taken from [602] all time cards, mixer and truck reports on the job up there at 1062.

Q. And whose record is it?

A. These are turned in day by day by the superintendent in charge of the job, to the main office in Portland.

Q. Of what Company?

A. Concrete Construction Company.

Q. Made day by day, you say?

Mr. Holman: I move that that portion of the witness' testimony that pertains to anything before he was on the job be stricken.

(Testimony of Patrick L. Darcy.)

The Court: All right. Perhaps you had better take him off and put the plaintiff on.

(Whereupon, the witness Darcy was temporarily excused from the witness stand.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Olson:

Q. Handing you plaintiff's identification 52, will you state what that is?

A. That is as stated by Mr. Darcy, the daily reports sent in to the office each day by the superintendent on job 1062.

Q. And are those your original records, which you have just described? [603]

A. They are.

(Whereupon, time cards for August, 1944, to April, 1945, inclusive, were marked Plaintiff's Exhibits No. 53 and 53-a to 53-h for identification.)

Q. Handing you plaintiff's identification 53 and 53-a to 53-h inclusive, Mr. Schaefer, I'll ask you to state what they are?

A. They are the time cards that accompanied the daily report as sent in by the superintendent on job 1062, each day.

(Testimony of M. C. Schaefer.)

Q. And are they your official records for that purpose?           A. They are.

The Court: Any cross-examination on those identifications?

### Cross-Examination

By Mr. Holman:

Q. Do I understand that one of each is sent in each day?

A. Well, it may be that there is an accumulation of two days' reports. I didn't mean to make it that specific. It may be that they weren't mailed one day, and mailed the next.

Q. What I'm trying to find out, does 53 also go in to the Portland office, or does it stay on the job?

A. No, they come to the office.

The Court: Any further questions?

### Cross-Examination

By Mr. Hawkins:

Q. Exhibit 52 for identification is made up from those time [604] cards, 53?

A. That's right.

Q. And they were made up under your supervision and control?

A. These cards were made up by the foreman on the job and the superintendent on the job. We entered the data from these cards into his daily report. He used them in making up that daily report.

(Testimony of M. C. Schaefer.)

Q. These time cards, then, are made up on the job, and the daily reports are also made up on the job? A. That's right.

Q. And then all of them are sent in to your office? A. That's right.

Q. From which you make up the payroll sheets?

A. That's right.

Q. And these are those records, and all of those records, pertaining to 1062, that you have?

A. Yes.

Mr. Hawkins: I have no objection.

Mr. Holman: I have no objection, except they're self-serving documents so far as the defendants are concerned, your Honor, and not admissible unless as illustrative of the witness' testimony.

The Court: Well, they haven't been offered yet, Mr. Holman. Any further questions of this witness?

(There being no further questions, the [605] witness was excused.)

### PATRICK L. DARCY

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

#### Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, referring to plaintiff's identifications 51, 52, and 53, will you state from whence you got the information that you made up plaintiff's identification 51?



(Testimony of Patrick L. Darcy.)

A. From these formen's time cards.

Q. And that's identification 53?

A. 53; and have you got 52?

Q. This is 52.

A. And the entries in that determine the designations on 51.

Q. Was the information on 51 made up from any source other than those two identifications, 52 and 53, and 53-a to 53-h inclusive?

A. No, it all comes out of there.

Mr. Olson: Now, we re-offer in evidence, then, plaintiff's identification 51, and in connection therewith, plaintiff's identification 52 and plaintiff's identifications 53 and 53-a to 53-h inclusive.

The Court: I wonder if it would be necessary to offer in evidence all of these records, identifications 52 and 53?

Mr. Olson: Well, I'd rather not, your Honor.

The Court: Why don't you offer the other singly? The records from which it is compiled are here, available, and marked, and will be available during the trial to anybody who wants to use them. I'd suggest you not offer them at this time.

Mr. Olson: Well, I withdraw my offer of 52 and 53 with the sub-letters, and offer plaintiff's identification 51.

The Court: I assume the litigants don't want to have to copy any more than they have to. All right, what are the objections to the offer?

Mr. Hawkins: Your Honor, we still object that this is not the best evidence.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I join in that, your Honor, plus the fact that they're self-serving documents with no right possibly to check them during the progress of the trial. There just isn't time. This sort of a matter should be in the nature of one submitted and given some opportunity to check. It is just impossible within the time limits.

The Court: It will be admitted as a compilation made by the witness and as illustrative of his testimony, the compilation being from documents identified in evidence here.

(Whereupon, Plaintiff's Exhibit No. 51 for identification was admitted in evidence.) [607]

Mr. Holman: Your Honor, identifications 52 and 53 and sub-numbers are to remain available to the adverse parties for inspection?

The Court: Yes, that was the purpose of having them identified, so that they will be here. They are available if anybody wants to examine them, or offer any part of them.

#### Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, counsel had the she-bolt, which I believe is plaintiff's Exhibit 44, broken down into a sub-exhibit as 44-a, and asked you if that could be removed if you had a lateral clearance of 11½ inches.

Mr. Holman: I challenge that statement, your Honor. I didn't ask that.

(Testimony of Patrick L. Darcy.)

Mr. Olson: I think you did.

Mr. Holman: No; I asked him the length of the she-bolt.

The Court: As I understand it, the testimony as I recall was that the length of the she-bolt as testified to, that section of it as particularly marked, was 11½ inches.

Mr. Holman: Yes, sir.

The Court: And that the witness testified it could be removed with a clearance of 12 inches.

Mr. Olson: I just mis-understood that. [608]

The Court: I know that.

Mr. Holman: I understand that.

#### Redirect Examination

(Continued)

By Mr. Olson:

Q. Then, Mr. Darcy, that would be clearance from what part of the form or panel, or clearance from what?

A. Clearance from the outside of the strong-back, which is the binding rail that holds the form in alignment.

Mr. Olson: That's all.

#### Recross-Examination

By Mr. Holman:

Q. But the portion of the she-bolt to be withdrawn would have been a part that went through the strong-back too, wouldn't it?

A. Would be what?

(Testimony of Patrick L. Darcy.)

Q. On your she-bolt, when it is through the structure, it goes through the strong-back too, doesn't it?      A. Yes, certainly.

Q. So that the length of the half of the she-bolt which is indicated by Macri's Exhibit 44-A would pass through both the wall and the strong-back, correct?      A. That's right.

Q. And it would have to have a total clearance of, you said 12 inches, did you not?

A. Well, clearance, yes, clear of the form.

Q. Now, can it be drawn back as far as the strong-back, and the strong-back knocked off? [609]

A. Yes, it can be.

Mr. Holman: That's all.

The Court: Any further questions?

Mr. Hawkins: No further questions.

The Court: Do you have any further questions?

Mr. Olson: No, your Honor.

The Court: May we excuse this witness at this time, then?

Mr. Olson: Yes.

(Whereupon, there being no further questions, the witness was excused.)

M. E. STICKNEY

called as a witness on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. M. E. Stickney.

(Testimony of M. E. Stickney.)

Q. Did you work on the job known as specifications 1062, out at the Roza Project?

A. I did.

Q. And by whom were you employed?

A. Mr. Macri.

Q. And in what capacity did you work for Mr. Macri?      A. Superintendent.

Q. And for what period of time?

A. From August 14 'till December 9. [610]

Q. Of what year?      A. Beg pardon?

Q. Of what year, Mr. Stickney?      A. 1944.

Q. And as his superintendent, what part of the project did you have under your control in this division?

A. Pipe laying and excavation of pipe line, structures, fine grading.

Q. Mr. Stickney, did you have charge or supervision of the excavations for structures on behalf of Mr. Macri?      A. I did.

Q. Now, did Mr. Macri give you any instructions with reference to the manner in which those excavations were to be made?      A. Yes, sir.

Q. And what were those?

Mr. Holman: Just a minute; written or oral?

A. Oral.

Mr. Holman: When, and where?

A. In Mr. Macri's home in Seattle.

Mr. Holman: When?

A. Oh, I couldn't say exactly the date; previous to the time I went to work, a few days.

Mr. Holman: Previous to August 14?

(Testimony of M. E. Stickney.)

Mr. Olson: Now, if your Honor please, I think [611] counsel will have an opportunity to cross-examine.

Mr. Holman: I wanted to fix a date; I didn't want to interfere.

The Court: Well, perhaps you had better request permission to ask questions out of turn, and don't interrupt counsel's examination.

Mr. Holman: I'm sorry, your Honor.

Direct Examination

(Continued)

By Mr. Olson:

Q. What were those instructions, Mr. Stickney?

A. They were to be staked one foot outside of the concrete line all around, and dug vertical.

Q. And dug what? A. Vertical.

Q. Dug vertical; were the banks dug vertical?

A. Approximately so.

Q. Now, with reference to the fine grading, or the preparation of the floor of the excavation, and the sub-elevations did Mr. Macri give you any instructions with reference to that part of the work?

A. Not at that time, no.

Q. Did he subsequently, and while you were superintendent?

A. Yes, afterwards, when he was over on the job, we had some talk about that.

Q. What did he say?



(Testimony of M. E. Stickney.)

A. Well, he said that a few tenths one way or the other [612] didn't make any difference, that he was paying Mr. Schaefer extra for a little fine grading anyhow.

Q. He said what?

A. He said he was paying extra for a little fine grade anyhow, and that we wouldn't bother with it.

Q. Who did he say he was paying extra?

A. Mr. Schaefer.

Q. And he told you not to bother about it?

A. That's right; not small amounts.

Q. And pursuant to those instructions, then, was the fine grading as performed by Macri and Company not performed to the exact sub-grade as called for by the specifications?

A. The ones that had been fine graded before I came, some of them were not.

Q. Did you go back and check some of those, Mr. Stickney? A. I did.

Q. What did you find about the excavations that had been made previous to your coming on the job?

A. Well, they were in some cases off line, some cases twisted, and some cases high, and some cases low, and some of them were all right, as far as elevations were concerned.

Q. What was the situation with reference to the equipment which Mr. Macri furnished you as superintendent, to carry [613] on his operations?

A. It was very poor at that time.

Q. Can you amplify that a little bit, Mr. Stickney, say in what regard, what equipment you refer to?

(Testimony of M. E. Stickney.)

A. Well, I might do that by illustrating how the situation was when I taken over.

Q. Well, do that.

A. Well, I had a Loraine Hoe that was sitting out there, wasn't operating the traveling gear was out of it; I had a "4" Cat, Caterpillar Cat, bulldozer Cat, and it was operating when I got there, but that was the last day it operated. They couldn't operate it any more.

Q. For what reason?

A. Well, they had worn the hoist valves out, for one reason, in the hoist; they couldn't raise the blade, and the motor, lack of power in the main motor itself, it had no power to even pull itself.

Q. It wouldn't work mechanically, then?

A. That's right.

Q. What was the situation with reference to any of the other equipment?

A. Well, the truck that I taken over, when Mr. Ashley drove it in the yard the front frame was sitting on the front axle, one shackle of the spring was broken, two leaves in the spring was broken, and the motor, mechanically, was [614] in very poor shape; and I had one International truck, ton and a half, that was in very good shape, that is, considering, and one ton and a half Ford truck that would still run.

Q. Did you make any requests to Mr. Macri to furnish you with different and better equipment?

A. I did.

Q. And did he furnish it to you?

A. No, sir.

(Testimony of M. E. Stickney.)

Q. Now, when you checked these excavations when you got on the job, and found them wrong, did you have any conversation with Mr. Macri about it?      A. I did.

Q. What did he say, and what did you say?

A. I suggested that we go back and re-fine grade, and he said no, that would cost too much money, that he had an engineer fine grade this, and a good one, and he knew they would be pretty close to right, and what little work there would be, he'd rather pay Mr. Schaefer than to put a crew back and fine grade ourselves.

Q. Those are the excavations to which you referred?

A. Had been already fine graded? Yes.

Q. So did you or did you not return and fine grade those?

A. I did return and fine grade some, but just the worst of them. [615]

Q. Now, did Mr. Macri furnish you with or permit you to hire sufficient crew to fine grade these excavations?

A. He didn't specifically object to hiring the crew, but I had no equipment to handle them.

Q. Did you have sufficient men in your employ to properly excavate and fine grade these excavations?      A. I did not.

Q. Did Mr. Macri ever make any statements to you about his policy with reference to this job, of sub-contracting the work?

Mr. Holman: I object to that as calling for the witness' conclusion, your Honor.

(Testimony of M. E. Stickney.)

The Court: As I understand it, it is not calling for a conclusion; it is calling for what Mr. Maeri said to him.

Mr. Holman: If he's referring to what he said—

The Court: Read the question, Mr. Taylor.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I had reference to the policy, if he's asking this witness to conclude what the policy was.

The Court: I'll overrule the objection. If he asks about particular things it may be objectionable as leading. I'll overrule it.

Witness: Yes, he did. [616]

Q. And what did he say?

A. Well, he said he'd like to sub-contract all the job he could; in fact, he'd like to sub-contract the pipe, if I could find someone to sub-contract the pipe laying to; he'd like to sub-contract that too.

Q. Did he say why?

A. Yes, the reason why, it throwed more responsibility out of his hands, and let the sub-contractors take the responsibility.

Q. Now, with reference to the lumber that was supplied on this job, did you have occasion as superintendent of Mr. Maeri to examine the lumber that was furnished?      A. I did.

Q. And would you describe that lumber as to its quality?

A. Well, some of it was fair, some of it was not so good, and some of it had been used before.

(Testimony of M. E. Stickney.)

Q. Now, was there—did Mr. Darey or Mr. Macri's superintendent request additional lumber on this job?

A. Mr. Fisher's superintendent, you mean, or Schaefer's?

Q. Schaefer's superintendent.

A. Yes, he did.

Q. And did you relay those requests to Mr. Macri, to furnish lumber?           A. I did.

Q. And just tell the Court what Mr. Macri would say to you, [617] or what developed with reference to furnishing lumber.

A. Well, usually when I'd call him up and give him the order he'd want to know what I wanted it for. When I told him it was for Mr. Schaefer he wanted to know what they had done with the lumber he sent before. I said it had been used in forms, and they were completely out, we should have some. He would say, ordinarily, well, it will be over Monday, or within a day or two, but usually he'd try and get it over Monday, but very seldom it ever came on Monday.

Q. What would happen when the lumber didn't show up; did you do anything about that?

A. Well, I'd call him again.

Q. What did he say?

A. Well, I can't say just what he did say, other than he just usually made an excuse that he hadn't been able to send it yet. He never refused to send it.

Q. State whether or not, Mr. Stickney, the form assembling crew, that is, the carpenters in the yard



(Testimony of M. E. Stickney.)

making the forms, were out of lumber, then, from time to time?      A. Yes, they were.

Q. You said some of this lumber had been used. What was there about it that indicated that it had been used before?

A. Well, it showed nail holes, and some concrete stains; [618] some of it was split, like it had been a shed tore down, or something of that sort; some of it had been used in concrete forms somewhere.

Q. Now, did Mr. Macri ever interfere with your superintendency of this job?

A. In what way?

Q. Well, did he make any statements about the number of men you had on the job, or about your payroll?

A. Well, yes, he repeatedly said he thought I had too many men on the job.

Q. What did he say about it?

A. I don't know if he said any more than that much, only that we must cut down on the payroll as much as possible.

Q. Would there be times when men that you had hired didn't show up for work?      A. Yes.

Q. Do you know whether or not they were discharged, or laid off?

A. I don't think they were discharged or laid off, none that I recall, under my jurisdiction.

Q. Now, Mr. Stickney, you said that you left this job when?      A. December 9, I believe.

Q. Of what year?      A. 1944.

Q. Now, were the excavations—were you able to complete the [619] excavations with the crew you



(Testimony of M. E. Stickney.)

had, and with the equipment you had, always ahead of the Concrete Construction Company?

A. No; no, I couldn't.

Q. And were they delayed and held up by reason of the excavations not being ready for their work?

A. They were once in a while, in the case of fine grading, yes, where a hole had been fine graded wrong and we'd have to go back.

Q. Were you discharged from this job, Mr. Stickney?      A. No, sir.

Q. Did you quit?      A. Yes, sir.

Q. And why did you quit?

A. Well, Mr. Macri developed the idea that I was working against him, instead of for him.

Mr. Holman: I move that be stricken, as a conclusion.

The Court: Yes, it will be stricken, as a conclusion.

A. And one reason——

The Court: I think he may show what Mr. Macri said.

Mr. Holman: No objection to that.

The Court: But I think this is rather a conclusion.

A. Well, he told me that in that many words.

The Court: Wait, just let the counsel ask you the questions.

Mr. Holman: I move that be stricken, as volunteered.

The Court: Yes. We have to proceed by question and answer, so that opposing counsel can object.

(Testimony of M. E. Stickney.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. What did Mr. Macri say, if anything, to you? What conversation did you have with Mr. Macri that led up to your quitting?

A. Well, the last time he was over there, about the last time he was there, he said "It looks like you're trying to work against me, instead of for me," as I understood him.

Mr. Holman: I move that that be stricken, your Honor—no, I'll not; he says as he understood him.

O. K.

Q. Did Mr. Macri ask you any time if you could take over the Concrete Structure work on this 1062 job? A. No.

Mr. Olson: That's all; you may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Stickney, when did you first prior—pardon me—when did you first after leaving the job talk with Mr. [621] Schaefer or any of his representatives? A. After leaving the job?

Q. Pardon me? A. After leaving the job?

Q. Yes, sir.

A. I believe it was last October.

Q. Last October; and where were you at that time? A. Lewiston, Idaho.

(Testimony of M. E. Stickney.)

Q. October, at Lewiston, Idaho; and who came to see you then?

A. Mr. Schaefer and Mr. Darcy.

Q. Which Mr. Schaefer?

A. M. C., I believe it was.

Q. And who else? A. Mr. Darcy.

Q. At your—you have a farm over there, do you, or a home? A. That's right.

Q. Now, at that time, or at any time after you left the job, did you advise Mr. Macri that they had talked to you? A. How's that?

Q. At that time, or any time afterwards, did you advise Mr. Macri that they had talked with you?

A. No, I hadn't saw him.

Q. And did you at any time or at any time subsequent give [622] them a written statement?

A. I did at that time.

Mr. Holman: May I call for the production of that statement, counsel?

The Court: I assume it will take some little time to cross-examine this witness?

Mr. Holman: I think it will.

Mr. Olson: I'm not willing to give them this statement unless your Honor directs me to. If they want to put this statement in evidence I've got no objection to it going into evidence, but it is my position they're not entitled to it to harass the witness. If they want to put it in evidence I'll consent right now to put it in evidence.

The Court: Well, we can take that up in the morning. The court has some other matters to take

(Testimony of M. E. Stickney.)

up, as usual, and I think it would be easier to let you just go out, and recess for five minutes, and then I'll come back and take up those matters.

Mr. Holman: May I ask your Honor if the Court holds sessions on Saturday?

The Court: No, I plan to adjourn tomorrow night until the following Monday morning.

Mr. Holman: On this case, your Honor?

The Court: On this case, yes. [623]

(Whereupon, the Court took an adjournment in this case until Friday, February 28, 1947, at 10 o'clock a.m.)

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Yakima, Washington, February 28, 1947,  
10 o'Clock A. M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: At the last of yesterday's session I asked for production of the statement signed by Mr. Stickney, Mr. Olson.

Mr. Olson: It's our position, your Honor, as I indicated last evening, that we should not be directed to produce the statement. Any document that's given by this witness to us is given for our information in questioning him. Counsel's only purpose in having it could be, as I indicated yesterday, to harass this witness on cross-examination, and as I further said yesterday, if counsel wishes to put the statement in evidence, then I have no

(Testimony of M. E. Stickney.)

objection to it going into evidence, but I don't believe that counsel has the right to demand a document out of my files not for the purpose of putting it in evidence, but solely for his use in cross-examining the witness.

The Court: Well, I think that either side has a right to demand of another any document that is pertinent and material to the case, if it isn't privileged, and [624] there is no contention that this is privileged as a communication between attorney and client, or anything of that sort?

Mr. Olson: No, your Honor.

The Court: I think they have a right to demand it for use; if he's made a former statement and there is anything inconsistent with what he testified, they have a right to use that, and if counsel does not put it in, then I think you would have that privilege if you wish to do so.

Mr. Olson: Your Honor directs me to deliver the statement to Mr. Holman?

The Court: Yes.

(Whereupon, Mr. Olson delivered the statement to Mr. Holman.)

The Court: I think he should return it when the cross-examination is concluded if he doesn't put it in evidence, however.

Mr. Holman: May I have a minute to read this, your Honor?

The Court: Yes, all right.

(Testimony of M. E. Stickney.)

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Mr. Stickney, I believe you told me that Mr. Schaefer and Mr. Darcy came to your home in Lewiston, Idaho, on or about the 24th of August?

A. That's right.

Mr. Olson: What month?

Q. 24th of August—pardon me, October.

A. October.

Q. 1946. I'll ask you whether or not at that time they made any representation to you as to whether or not there was an arbitration pending?

Mr. Olson: That's objected to as being immaterial, if your Honor please, any discussion about arbitration. I didn't go into arbitration.

The Court: Well, I presume it is leading to something else. Overrule the objection.

A. I believe they said they had a hearing on this trial.

Mr. Olson: Had what?

A. Had some sort of a hearing on this case.

Q. They said they had had some sort of a hearing on this trial?

A. On this case, as I remember it.

Q. Did they tell you where it was they had a hearing? A. No.

Q. Tell you before whom they had a hearing?

A. No.



(Testimony of M. E. Stickney.)

Q. Tell you when they had a hearing?

A. No.

Q. And did they tell you then that if you gave a statement [626] it would help in the matter of the adjustment and settlement of the case?

A. That was the understanding.

Mr. Olson: Now, if your Honor please, this is not cross-examination of this witness, if the statement has not been offered into evidence. What I asked Mr. Stickney——

Mr. Holman: Here's your statement.

Mr. Olson: Yes, I gave it to you. If he wants to put that statement into evidence that's something else, but he's now gone into an entirely collateral matter.

The Court: I suppose he's leading to interest or bias. On that ground I'll overrule the objection.

Q. Did they tell you at that time that you would be required to attend at that hearing they were talking about?

A. They didn't say that I would be required. They asked me if I would attend.

Q. Didn't they tell you this, that if you wouldn't attend you would be subpoenaed and forced to come? A. They did not.

Q. And did they make any arrangement for your compensation for coming?

A. They said they would reimburse me for my expenses, yes. [627]

Q. And at that time did they tell you when there would be any hearing? A. No.

(Testimony of M. E. Stickney.)

Q. Now, they furnished you a photostat of this statement you furnished them, didn't they?

A. They did.

Q. Who prepared the context of this statement that they furnished you a photostat of?

A. I prepared it.

Q. As you would talk it over with them?

A. Very little.

Q. Mr. Darcy was there, wasn't he?

A. Yes.

Q. Did he have anything to say?

A. Well, not a great deal.

Q. And Mr. Schaefer had nothing to say?

A. Some, yes; we talked.

Q. Now, isn't it a fact they talked the whole thing over with you and then the statement was written after the talk was over?

A. They did not, because I was working.

Q. Then you sent them the statement later?

A. No.

Q. What do you mean by that, sir?

A. They came out on the job where I was working, and wanted [628] to know if I would give them a statement. I said I was working and I couldn't spare the time right then; if they minded to wait until lunch hour I would give them a statement then, which they did. They sat in a car out on the job and I worked until noon. They went to my house for lunch and I dictated the statement to my wife and she wrote it, so I could get back on the job.

Q. This is your wife's handwriting?

A. That's right.

(Testimony of M. E. Stickney.)

Q. Now, during the course of the writing of this statement, isn't it a fact that from time to time your wife would discuss with you as to whether or not you should make that statement or the other one?

A. Other one?

Q. One statement or another? A. No, sir.

Q. She had nothing to do with the discussion as to what went into the statement? A. No, sir.

Q. They furnished you with a photostat copy?

A. That's right.

Q. They told you to keep that to remember what your testimony would be?

A. No, they didn't tell me to keep it.

Q. You didn't ask for it, did you? [629]

A. No, sir.

Q. They had that plan set up to take that photostatic copy and send you a copy?

Mr. Olson: I object.

The Court: I'll sustain the objection. He didn't know their plan.

Q. And was the photostat mailed to you?

A. That's right.

Q. You don't have that with you?

A. I do not.

Q. Here's your statement, counsel. Now, did you at any time after that, after securing the statement, notify Mr. Macri that you had given such a statement? A. I did not.

Q. I think you said that yesterday. You went to Mr. Macri's office in Seattle, did you not, shortly ahead of the time that you became employed? I

(Testimony of M. E. Stickney.)

think you said you started the employment on August 14th.       A. I went to his house.

Q. You didn't go to his office?

A. I might have went once to the office before I came over.

Q. I'm referring to 905 10th Avenue South, where the office is, down there by the bridge.

A. I'm not positive I was down there before I came over or not. [630]

Q. Isn't it a fact, Mr. Stickney, that you came to Macri's office, you told him you had a daughter in Seattle, you were at the time living with the daughter in Seattle, and that you had come down for the purpose of seeing if you could get work on Macri's job?

Mr. Olson: Objected to as not proper cross-examination.

The Court: When was this supposed to be?

Mr. Holman: Just ahead of taking the employment.

The Court: That's going pretty far back, isn't it? What's the purpose of it?

Mr. Holman: The purpose is to show the interest of this witness.

The Court: Well, to show his interest that he wanted a job? I don't get how it would show his interest, the mere fact that he wanted employment.

Mr. Holman: I mean as a matter of solicitation of the employment.

The Court: Well, I'll overrule it, then.

A. Not at the office.

(Testimony of M. E. Stickney.)

Q. Well, that was what you said, was it not?

A. No.

Q. I'll ask you if you didn't at that time tell Mr. Macri that you had been working for another contractor over here in the Roza Project—you had been working for [631] H. H. Walker, Inc.?

A. That's right.

Mr. Olson: If the Court please, that certainly doesn't show——

The Court: Wait until he finishes the question.

Q. And that your salary with Walker as superintendent had been \$90.00 per month?

A. I believe that's right.

Q. Per week, I should say; and that you would want that same compensation?

A. That's right.

Q. Yes. And I'll ask you if Mr. Macri didn't say that that would be all right?

A. That's right.

Q. And is it a fact that you were employed then to take over the work as superintendent, at \$90.00 per week?

A. That's right.

Q. Yes.

(Whereupon, computation of compensation of M. E. Stickney during period of employment with Macri & Company was marked Defendant Macri's Identification 54.)

Q. Handing you what is marked Macri's 54 for identification, Mr. Stickney, which purports to be a copy of your compensation during the period that you have testified you [632] were on the job, and

(Testimony of M. E. Stickney.)

handing you the Macri payroll beginning with the week of August 16th, that would be the week that you started, would it not?      A. That's right.

Q. Their week began with a Tuesday and ended with a Monday?      A. That's right.

Q. Now, is that particular payroll in your hand?

A. No.

Q. All right, now turn on from there. You're on that particular payroll?      A. Yes.

Q. M. E. Stickney is shown for Monday, Tuesday, Wednesday, at eight hours a day, and weekly \$50.00?      A. Yes.

Q. Now, would you trace through, with due regard to this, Mr. Stickney, maybe you can tell without tracing through, whether or not that is a true representation of your total compensation?

A. Yes.

Q. It is?      A. Yes.

Mr. Holman: All right, I offer it in vidence, your Honor, as further indiction of the witness' interest.

Mr. Olson: Now, if the Court please, with all due [633] respect to counsel, I submit that's not the purpose for which this document is offered, to show that they had been paying Mr. Stickney some sum of money. Obviously they were paying him. I've shown that he was their superintendent. Now, when I put Mr. Stickney on the stand I asked him about condition of equipment and excavations and conversations with Mr. Macri about the job. Now, how is it proper cross-examination, or how does it prove



(Testimony of M. E. Stickney.)

that he's interested in our side, to show that he was on their payroll and receiving a certain compensation? I submit that the purpose of that exhibit is not to show Mr. Stickney is interested on behalf of the plaintiff. We object to its introduction.

Mr. Holman: I don't say he's interested on behalf of the plaintiff. I'm showing his true situation.

The Court: Is there any question of his being the superintendent during the time he testified?

Mr. Holman: No, nor is there any question about his compensation as shown on the payroll.

The Court: How does his compensation bear upon his interest? How is it proper cross-examination?

Mr. Holman: What I want to show, your Honor, is that this witness had the control of fixing even his own compensation, because this payroll shows that he went over there at \$90.00 a month, and he fixed his compensation [634] at \$100.00——

The Court: I thought the testimony was he went over at \$90.00 a week?

Mr. Holman: A week, and this shows \$100.00 a week.

The Court: How does that show he had the power of fixing his compensation? That might have been by subsequent agreement or arrangement.

Mr. Holman: He said he made up the payrolls, your Honor.

The Court: Does that mean he fixes his own compensation?

Mr. Holman: Yes, sir.

(Testimony of M. E. Stickney.)

The Court: No, I think not. I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you arrived there, did you not, ahead of or on the 14th of August?

A. That's when I taken over, I believe.

Q. Yes; and when you arrived, Mr. Verne E. Ashley, an engineer, had been on the job and was on the job?

A. That's right.

Q. And he remained on the job, did he not, for two or three days afterwards, to orient you to the job?

A. That's right. [635]

Q. It is also a fact, is it not, that on the first day that you were on the job, August 14th, Mr. Macri, as prearranged with you, came over on to the job on that Monday that you started work?

A. He came over with me; whether it was on Monday or the day before I don't know.

Q. You say he came over with you?

A. Well, he came over that day; I don't remember whether he come with me or not.

Q. You took your trailer, didn't you?

A. I think so.

Q. But Mr. Macri met you on the job?

A. That's right.

Q. And you and Mr. Ashley had been out on the job, and then you came back to the office, and there's where you met Mr. Macri?

A. I believe that's right.

(Testimony of M. E. Stickney.)

Q. Now, hadn't Mr. Macri told you to go over and take up matters with Mr. Verne Ashely with the idea of substituting for Mr. Ashley, because he wanted to come back to Seattle?

A. I believe so.

Q. That his home was in Seattle and that he wanted to come back. Will you tell me, please, when and where, and in whose present, Sam Macri told you this? Counsel asked [636] you "What were those instructions, Mr. Stickney?" Answer, "They were to be staked one foot outside of the concrete line all around, and dug vertical". You're speaking of excavations. I want to know when and where and in whose presence that statement was made.

A. That was in Mr. Macri's house in Seattle, and I believe Wayne Gentry was there, and my daughter.

Q. Who is Wayne Gentry?

A. My daughter's husband.

Q. All right; now, will you take the calendar for 1944, and with reference to Monday, August 14th, can you see that, Monday, August 14th?

A. Yes.

Q. First, the approximate time that that meeting was, in the Macri home?

A. Well, I wouldn't say for sure; I think probably around the 10th or 11th, somewhere near there.

Q. Just a minute; you think it was around Thursday or Friday preceding the time you came over?

A. I think so.

(Testimony of M. E. Stickney.)

Q. And what was the time of day?

A. In the afternoon and evening.

Q. In the afternoon and evening. Were any of Mr. Macri's family there? A. No. [637]

Q. Now, will you tell me what Mr. Macri's statement was exactly, to the best of your ability?

A. No, not very much of it.

Q. Well, what was his statement to the best of your recollection?

A. Well, I don't recall that Mr. Macri made any particular statement, only just the course of conversation about the job, as to how it was being run, and what the general practice was on that job.

Q. Counsel asked you "What were those instructions?" Now, did Macri give you instructions that day? A. That's right, he did.

Q. What were they?

A. Staking one foot outside of neat concrete line; and I asked him at that time "Are you digging on a slope, or vertical?" and he said the holes were just dug vertical.

Q. Why did you ask him?

A. Because I knew the specifications.

Q. You had been on the job, hadn't you?

A. On that job? No, sir.

Q. You had not?

A. Oh, I had been down there, but not to look the job over, no.

Q. You had looked the job over?

A. I did not. [638]

(Testimony of M. E. Stickney.)

Q. You had seen operations in the field generally, hadn't you?      A. Not on their job.

Q. Well, I say generally in the field?

A. Not on that job.

Q. Had you seen it generally in the Roza Project?

Mr. Olson: That's objected to as being immaterial.

The Court: I'll overrule the objection.

Q. You had done the job for Walker right there, hadn't you?      A. That's right.

Q. And that was an adjoining job, wasn't it?

A. Not an adjoining job, no.

Q. Well, it was in the same vicinity, wasn't it?

A. That's right.

Q. And you knew how excavations were made generally?      A. I knew how I made them.

Q. And you told Mr. Macri how you made them?

A. That's right.

Q. And he told you to do the same thing, didn't he?      A. That's right.

Q. Now, with reference to the fine grading, or the preparation of the floor for excavation—pardon me—with reference to the fine grading, or the preparation of the floor of the excavation for receipt of the form, you say [639] that Macri did or did not give you instructions at that time with respect to that? I'm talking about this time in the house.

A. I think that was brought up; that was one part of the job I was to take care of.

(Testimony of M. E. Stickney.)

Q. And did he give you instructions at the house at that time with respect to that?

A. I think so.

Q. All right. Now, yesterday, when counsel asked you, and I'm reading from the reporter's record "Now, with reference to the fine grading, or the preparation of the floor of the excavation, and the sub-elevations, did Mr. Macri give you any instructions with reference to that part of the work?" Answer, "Not at that time, no"; question, "Did he subsequently, and while you were superintendent?" answer "Yes, afterwards when he was over on the job we had some talk about that."

A. Well, probably.

Q. Well, now, which is it, Mr. Stickney; at the house there, when he was giving you instructions, or was it on the job?      A. Well, I think both.

Q. Then when you told counsel he didn't give it at that time you were in error?

A. I imagine I was, if I said that, and I guess I did.

Q. Didn't Mr. Macri tell you, in substance, this, when the [640] matter of fine grading was discussed, and the details of fine grading on the job, that Schaefer and Macri had talked about the fine grade, and Schaefer had told Macri that he would rather have it high, a little, and take off some, than to use more concrete if it were below grade?

A. I never heard any such conversation.



(Testimony of M. E. Stickney.)

Q. You never heard any such conversation, sir? What was the conversation Macri had with you, with respect to Schaefer?

A. It was very little.

Q. I thought you detailed quite a lot here yesterday? A. Beg pardon?

Q. Yesterday you told, did you not, what it was?

Mr. Olson: I don't think that's a proper question, your Honor. If he wants to direct the witness to certain questions and answers I have no objection to it, but I don't recall him testifying about Mr. Schaefer.

Q. Macri's conversation with you about Mr. Schaefer. A. I didn't get the question.

Q. I want you to detail Macri's conversation with you about Mr. Schaefer and the fine grading.

Mr. Olson: Now, your Honor, that question is a double question. I don't know what——

Q. Well, pertaining to the fine grading.

The Court: Well, you had better ask the question over again. I think it is a double question. [641]

Q. I want you to detail any conversation you had with Mr. Macri about the fine grading as pertaining to Schaefer's job; let's say as pertaining to this 1062.

A. Well, I can't recall any definite conversation.

Q. You can't? A. No, not in detail.

Q. Were the units as bid by Schaefer or his sub-contract, or his sub-contract bid, at all discussed between Macri and you?

(Testimony of M. E. Stickney.)

Mr. Olson: That's not proper cross-examination, if the Court please. I didn't go into any conversation between Mr. Macri and Stickney relating to Schaefer's bid.

The Court: I think it is generally pertinent. I'll overrule the objection.

A. Yes, it was.

Q. What did you do, read the sub-contract?

A. I never did.

Q. Well, what was said about it?

A. Well, he just told me what was in it.

Q. You didn't see it, then, at all?

A. I never saw it.

Q. Now, when you got over on the job on August 14, 1944, did you meet Mr. Verne E. Ashley for the first time, or had you known him before?

A. I believe I met him about a week before that.

Q. In fact, you were fellow superintendents on the Roza Project, weren't you?

A. That's right, but I never saw him while I was working.

Q. Oh; well, where did you meet him the week before?

A. I think just beyond Macri's office, in the road.

Q. And then had you arranged at that time with Mr. Ashley that you would go to Seattle for the purpose of being employed to replace him?

A. I had no intentions.

Q. Well, when you came and had been out on the job on August 14, 1944, before you and Mr. Ashley met Mr. Macri, what had you done with respect to inspection of the job?

A. Nothing.

(Testimony of M. E. Stickney.)

Q. Had you gone over any of the work that was fine graded? A. Before that, you mean?

Q. No, that day, that morning?

A. Oh, that day; no.

Q. Had you talked with Ashley about fine grading? A. I had.

Q. And had you looked at any of the fine grading at all? A. Oh, I drove by them, yes.

Q. No, I mean that day.

A. That day, yes, we drove by some.

Q. In other words, you were in a car, you and Ashley? A. That's right, in my car. [643]

Q. Were the structures in at that time, Mr. Stickney? A. They were, a few.

Q. How many, about?

A. Oh, I couldn't say.

Q. Why can't you say? Can't you approximate, sir?

A. Oh, approximately thirty, maybe, I'd say.

Q. Thirty structures in on the whole job?

A. I think so, something like that.

Q. In August?

A. I couldn't say how many was in.

Q. Now, may I understand, please, we're talking first about lateral 59.3. You say there were only thirty structures?

A. I said I didn't know; I said somewheres around there.

Q. All right; those you saw, did they give evidence of having been newly placed, or having been there a long while?

A. You mean the forms, or the structures?

Q. The forms.

(Testimony of M. E. Stickney.)

A. Well, the forms that I saw setting hadn't been setting too long, I don't believe.

Q. Did you see any forms that had been there for a long while? A. No.

Q. That were weather cracked? A. No.

Q. You didn't? And when you say about thirty structures, [644] you mean there had been about thirty poured by them? A. I think so.

Q. Well, how many forms were up, besides—empty ones? A. I don't know.

Q. Well, would you say ten, twenty, a hundred, a hundred and fifty, or what?

A. I still don't know.

Q. Can't you give me any idea?

A. No idea.

Q. Now, at that time, that day, did you see the job yard? A. Yes, sir.

Q. And were there form panels constructed in the yard? A. There were some.

Q. Well, what do you mean by some, sir?

A. Oh, a few; not many.

Q. Well, enough to fill how many holes, about?

A. Well, I wouldn't know.

Q. Sir?

A. I wouldn't know how many structures it would make.

Q. And were all the forms that were on the job filled with concrete? A. No.

Q. And you can't estimate how many were in?

A. No.

(Testimony of M. E. Stickney.)

Q. Where was the shovel excavation on that day that you went [645] there?

A. I don't know, to the exact number.

Q. But there was shovel excavation going on?

A. No, sir.

Q. There was none going on that day?

A. No, sir.

Q. Did you talk with Mr. Ashley about that?

A. I did.

Q. And what did he say?

Mr. Olson: If your Honor please, I just think counsel is going pretty far in his cross-examination. Now this particular thing, asking for conversations between two of Mr. Macri's foremen, certainly I didn't go into where the hoe was, and what was the matter with the hoe.

Mr. Holman: I'm not asking about the hoe; I'm asking about shovel operations.

The Court: You're asking about conversation.

Mr. Holman: I'll withdraw. I was trying to get the orientation of this witness to that job that day with the other superintendent before he left.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Was there fine grading going on that day?

A. No, sir.

Q. Was there any called for that day, while you were there? [646]

A. No.

(Testimony of M. E. Stickney.)

Q. Was there any pouring going on that day?

A. I believe they did pour that day; I'm not positive.

Q. Did you watch the operation?

A. I don't believe the first day I did.

Q. Did you, while Mr. Ashley was still there, watch that operation?      A. Yes, sir.

Q. Did you watch an operation of fine grading while Mr. Ashley was there?

A. There was none.

Q. Then you didn't watch any?

A. No, sir.

Q. Did you watch any shovel excavation while Mr. Ashley was there?      A. No, sir.

Q. Or hoe operation?      A. No, sir.

Q. Or Cat operation?      A. No, sir.

Q. Now, the Cat operation, when we refer to Cat we mean Caterpillar Tractor, that's correct, isn't it?

A. That's right.

Q. It's commonly called in the field Cat?

A. That's right. [647]

Q. Now, the Cat operations, were there any Cat operations going on?

A. The day I got there it was working a little.

Q. What were they doing?

A. Back-filling pipe line.

Q. By that you mean bringing the earth back to the complete concrete structure?

A. No—pipe line.

Q. Oh; then the Cat was working on the pipe line?      A. That's right.



(Testimony of M. E. Stickney.)

Q. And was the shovel set to work on the pipe line at that time?           A. No, sir.

Q. Where was the shovel set?

A. It was setting out in a plowed field about two miles from where the Cat was.

Q. That was the Laraine, was it, then?

A. That's right.

Q. What is the fact with respect to whether or not there was a rented Bay City shovel operating at that time?

A. No, sir; it was there, but not operating.

Q. Now, how long do you say it was that there were no machine or Cat operation?

A. Well, I couldn't say for sure.

Q. I mean hoe or Cat operations? [648]

A. I couldn't say for sure. I think, come to think of it, I will change that statement about the Bay City. I believe it did finish the lateral it was on sometime while I was there; I'm not sure about that.

Q. Now, isn't it a fact, and didn't you learn when you were on the job on the 14th, that the Bay City had been working continuously up to August 11th?           A. I believe it had.

Q. Yes, sir.

Mr. Olson: Now, if your Honor please, I'm going to move that be stricken. Obviously it would have been based on conversation related to him, as to what the shovel had been doing up to August 11th, before he got there.

(Testimony of M. E. Stickney.)

Mr. Holman: This is to meet the witness' statement on direct that there was no equipment, adequate equipment—broken down equipment.

Mr. Olson: I was asking while he was there.

The Court: Obviously anything that happened while he was there would be a matter within his knowledge.

Mr. Holman: Except for his information with respect to the job.

The Court: Well, he wouldn't know whether the machinery was operating before he got there or not, except by hearsay. [649]

Q. Had you seen it operate?

The Court: Before he got there, you mean, Mr. Holman?

Mr. Holman: Well, he had been there, your Honor, on the other job.

A. Oh, no; nowheres near there on the other job.

Q. Could you tell me, please, with respect to the Macri payrolls now, I'll ask you a few questions about the men, if on October 21 you didn't start using Mr. Spencer Tully's Cat? Will you look at the payroll to see if you had a Cat operator there?

A. Well, I'm sure that that's right. I wouldn't say that was the date, but I did use the Cat.

Q. Yes, sir, but it was used on the job there, the Cat and the 'dozer? A. That's right.

Q. Is that the one you said was worn out and the motor was gone and no treads?

A. No, sir.

Q. In other words, there was another one put on?

(Testimony of M. E. Stickney.)

A. There was another one put on, yes, sir; that was Mr. Tully's.

Q. All right; would you look at the payroll and satisfy yourself whether or not on August 17th, three days after you got there, the Laraine Hoe was not being [650] operated?

A. Was not being operated?

Q. Was being operated?

A. I don't believe it was.

Q. Will you take a look and see if on August 17th it was not operating? These records you're referring to, Mr. Stickney, are your own handwriting, are they not? A. Yes.

Mr. Olson: May I inquire, your Honor, if the payroll shows whether or not the machine was operating, or whether it merely shows the operator on the payroll?

Mr. Holman: I'm asking the witness to refresh his memory off the payroll, and the witness can do it where you or I could not, counsel.

Mr. Olson: I want to make sure the witness understands whether or not you're asking whether there was a shovel operator on the payroll, or whether it was operating.

The Court: I thing the question was whether the shovel was operating.

Mr. Olson: I don't know whether the witness understands or not.

Mr. Holman: If he doesn't he can say so.

A. No, it wasn't operating.

Q. You did have a shovel operator on the payroll that day, [651] didn't you? A. That's right.

Q. What did he do?

(Testimony of M. E. Stickney.)

A. Overhauling the shovel.

Q. Now, isn't it a fact, Mr. Stickney, that that shovel was back on the job with over three thousand dollars expenditure on it, and operating, after August 17th?

A. That's right; I wouldn't know how much the expenditure was.

Q. But within three days after the time you got there it was operating? A. No.

Q. How many days?

A. I wouldn't say, but it was more than that.

Q. George Siegel is the man I'm talking about.

A. That's right.

Q. He's the operator, is he not?

A. That's right.

Q. Now, between the time you got on the job and October 21, 1944, the operations were all digging, weren't they, shovel excavation?

A. There was one Hoe probably working by that time; I don't remember.

Q. By October?

A. Yes; oh, by October, yes, there was one Hoe operating. [652]

Q. But the general operations were excavation?

A. That's right.

Q. For structures. Now, about nine days after you got on the job, you employed a Mr. Wyckoff as engineer, did you not? Will you consult your payroll and see if he didn't go on about August 23? Can you find August 23?

A. I haven't yet, no.

(Testimony of M. E. Stickney.)

Q. I had turned down the page there that you started on.

The Court: You'll have to speak up, Mr. Holman; you're starting to mutter.

Q. I had turned the page down that you started with before; I thought it might help you work from there forward, Mr. Stickney.

A. What was that date?

The Court: 17th of August.

Q. August 23, didn't he go on the payroll?

The Court: 23rd, was it?

Q. 23rd of August, yes.                      A. Yes.

Q. Now you hired Mr. Wyckoff yourself?

A. I presume I did.

Q. Well, isn't it a fact you did?

A. I don't know.

Q. You can't remember?                      A. No. [653]

Q. You hired him as an engineer, did you not?

A. I don't know.

Q. What does it show there?

A. It shows as an engineer.

Q. Yes, sir. Now, then, Mr. Wyckoff as an engineer worked then continuously through, did he not, until December 11, 1944, as an engineer? Just check through there, will you, on his name?

A. I presume he did.

Q. Well, doesn't it show there, Mr. Stickney, in your handwriting?

A. Well, it shows as far as I see, yes. I don't dispute it.

(Testimony of M. E. Stickney.)

Q. Yes, sir. Now then, additionally, on December—pardon me, on November 18th, you employed Mr. King, did you not? A. I did not.

Q. Well, on December 11th Mr. King came on to the job, did he not, as engineer?

A. I wouldn't know what time.

Q. Would you consult again, there, sir? That's still your payroll. A. On what date?

Q. December—pardon me—November 18th, Mr. Stickney; Mr. Wyckoff having left on the 11th, Mr. King came on as an engineer on the 18th of November, correct?

A. Mr. King on the 18th of November? [654]

Q. Yes, sir. A. Oh, yes—yes.

Q. Right? A. That's right.

Q. Then two days later you employed and put on Mr. Black, did you not? A. That's right.

Q. And what was Mr. Black's capacity?

A. Engineer.

Q. On November 20th? A. That's right.

Q. Then both King as engineer and Black as engineer stayed on until you left on December 9th, is that right? A. That's right.

Q. 1944. Now, is it or is it not a fact that your employment of men while you were superintendent there was left in your hands, to get men as required, and of the class of men you wanted, and the pay, you fixed the pay? A. That's right.

Q. Yes, sir. And is it not a fact that you got men wherever you could in the labor market, scarce as it was? A. That's right.



(Testimony of M. E. Stickney.)

Q. It was a scarce labor market, was it not?

A. That's right.

Q. Yes; and you were the sole one to select and the sole one [655] to determine number of men and the sole one to determine how long they should stay or whether they should stay? A. That's right.

Q. Yes, sir, and I believe you said on direct examination that Mr. Macri didn't interfere with that? A. I don't believe he ever did.

Q. Yes, sir.

A. Oh, yes, one time when I first wanted to hire Mr. Black he objected, and I finally hired Mr. Black without permission.

Q. Well, anyway, you hired him, didn't you?

A. That's right.

Q. And from that time on there was no objection to the number of men you had?

A. No, sir, not specifically.

Q. Sir? A. Not specifically.

Q. Well, all right; so that insofar as the fine grading was concerned you could get the men you wanted, could you not?

A. I could get the men, yes.

Q. How many comprised a workable crew of fine graders under Mr. Black?

A. Oh, different numbers; one day maybe one, next day maybe two, maybe three; I sometimes had to pull them to do [656] other work.

Q. What I want to know is what is a normal crew, three or four men?

A. About four men, yes.

(Testimony of M. E. Stickney.)

Q. And when we speak of Mr. Black, that's James A. Black, the gentleman here in the courtroom?      A. That's right.

Q. Now, the equipment for a fine grading crew, Mr. Stickney, is a shovel or a spade and a mattock, isn't it, primarily?      A. A pick, usually.

Q. A pick or mattock and a shovel?

A. That's right.

Q. Not any of the mechanical equipment at all?

A. Got to have a truck to get them around.

Q. Well, that's for transportation, is it not?

A. That's right.

Q. But I'm talking about the equipment.

A. That's right.

Q. It's hand grading?      A. That's right.

Q. It's what I think is generally known as "manicuring"?

A. Well, I haven't heard it. It could be.

Q. You haven't heard of "manicuring" banks?

A. It could be.

Q. In other words, it is to dress down to a fine basis what [657] had been previously excavated in the rough?      A. That's right.

Q. When did you start Mr. Black on fine grading?

A. Well, he worked there part of the time.

Q. I think we said that was November 20th?

A. November 20th, I believe it shows here.

Q. Now, did you or did Mr. Black determine that Mr. Ashley's work in fine grading was in error?

A. Both of us.

(Testimony of M. E. Stickney.)

Q. Both of you did. How was that done?

A. By going back and checking.

Q. And then you say you told Mr. Macri?

A. I did.

Q. That it was out of line, off the line, was it?

A. Yes, sir.

Q. In other words, he had a line set, but it was off of the line, right?

A. There was no line set.

Q. Well, what do you mean by out of line?

A. Out of line of the natural run of the ditch.

Q. In other words, the structure had been excavated and the fine grading had been done so that if it had been used and a concrete structure was put in it, it would have zig-zagged out and come back in?

A. That's right. [658]

Q. How far? A. Oh, they varied.

Q. Well, what is the maximum?

A. I run into some as much as two feet.

Q. Two feet over out of the way?

A. That's right.

Q. What did you do to make another hole?

A. Dug the other side out so they could set the structure back on line.

Q. What station was that?

A. I wouldn't know.

Q. Approximately what station was that?

A. I don't know.

Q. What lateral was it? A. I don't know.

Q. You can't even tell me the lateral?

A. Not off hand.

(Testimony of M. E. Stickney.)

Q. Is there any way you can inform yourself?

A. No.

Q. Can you tell me whether it was one of the small numbered structures or one of the last numbered structures?

A. It was about the center of the job, somewhere; probably 200, 250, somewhere along in there.

Q. Now, isn't it a fact, Mr. Stickney, that you had as the work of Mr. Black, sir, digging by hand a hole or two so [659] that the shovel would not have to come back?

A. That's right, probably; I don't recall. I know we dug some, but whether it was the first operation I don't know.

Q. And didn't you determine it was better to dig by hand those small structure holes than to call the shovel back?

A. That's right; the shovel was miles ahead.

Q. And that was your direction?

A. That's right.

Q. Now, were they dug right?

A. Far as I know.

Q. Were they fine graded right?

A. Far as I know.

Mr. Olson: Now, I object to counsel asking if they were dug "right". He should ask the witness, it seems to me, to describe the manner in which they were dug. There seems to be a dispute here as to what is the right kind of a hole.

(Testimony of M. E. Stickney.)

The Court: Well, I'll overrule the objection. It's his idea of what was right. Of course, it is understood you can bring out on redirect what it was.

Q. None of the holes that were dug under your direction and fine graded under your direction had anything wrong with them? A. Oh, yes.

Q. They did? [660] A. Sure.

Q. Did you keep track of them? A. No.

Q. Did you make any report of them?

A. No.

Q. Did you correct them? A. Yes.

Q. Now, wasn't it a fact, Mr. Stickney, to the best of your knowledge, that corrections were made wherever any error was determined?

A. The best of my knowledge, yes.

Q. That was done consistently on the job, was it not? A. That's right.

Q. And the hoe operation is a rough operation, is it not, Mr. Stickney? A. That's right.

Q. And a fine grading operation, as we said before, is a rather exact operation?

A. That's right.

Q. Was there any time while you were there that any of the Schaefer crew asked you to increase the width, the slope of the width of the excavation banks? A. No, sir.

Q. There was never any request made for that?

A. Not to me. [661]

Q. Yes, sir. Now, is it or is it not a fact that shortly after you came there you told Mr. Macri that Darcy, as superintendent of Concrete Con-

(Testimony of M. E. Stickney.)

struction Company, didn't know how to pour concrete? A. No, sir.

Q. That is not a fact, sir?

A. That's not a fact.

Q. And did you not tell Mr. Macri that the concrete operations being carried on under Darcy's direction were not being done right?

A. I don't recall that, no, as far as right was concerned.

Q. Didn't you tell Mr. Macri that they had the wrong type of equipment?

Mr. Olson: Well, I'm going to again object. I called Mr. Stickney, made him my witness, but to permit counsel to go into matters not even related to conversation, to now go into conversation between Mr. Macri and his superintendent, it seems they're going 'way beyond my direct.

Mr. Holman: This is preliminary to the instructions Mr. Macri gave this gentleman.

The Court: Preliminary?

Mr. Holman: Preliminary.

Mr. Olson: That's the same answer counsel makes every time, but it's never connected up with anything. [662]

The Court: I think this is improper cross-examination. Any conversation he had as to whether Schaefer's superintendent was doing his work right was not remotely connected with direct examination, unless you connect it up with something else.

Mr. Holman: I'm connecting it with conversations between Macri and this witness.

The Court: Later conversations?



(Testimony of M. E. Stickney.)

Mr. Holman: Yes, with respect to instructions to this witness.

The Court: Well, get the instructions first, and then we'll see whether you can come back to this or not.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you not have a conversation with Mr. Macri with respect to the Darcy operations of concrete pouring, and in connection with that, did not Mr. Macri say this to you, Mr. Stickney: "You let them run their job, and you run yours"?

Mr. Olson: That's objected to as not proper cross-examination, not relating to a matter covered or touched upon in my direct.

The Court: Not unless it has something to do with the excavations or fine grading.

Mr. Holman: That's what I'm getting at.

Q. Didn't he tell you to fine grade as well as you possibly [663] could, and to give the Concrete Construction Company nothing to complain about?

A. No, sir.

Q. He did not? A. No, sir.

Q. You never had such a conversation with Mr. Macri? A. No, sir.

(Whereupon, copy of Macri payroll for time of Stickney's employment was marked Defendant Macri's Exhibit No. 55 for identification.)

(Testimony of M. E. Stickney.)

Q. I have had marked for identification number 55, Mr. Stickney, which is intended to be a copy of the payroll for the time that you were at this job. Would you at your convenience or during recess, I see it's about recess, check that against the Macri payroll you're holding, and if you approve it, let me know if that's a correct copy?

A. I'll try.

Mr. Holman: May I suspend now, your Honor?

The Court: Yes, we'll recess for ten minutes.

(Short recess.)

(All parties present as before and the trial was resumed.)

#### Cross-Examination

(Continued)

By Mr. Holman:

Q. As far as you have been able to, Macri's 55 for identification [664] has checked all right against the payroll? A. As far as I got.

Q. Would you kindly keep that, and let me—I'd like to defer, your Honor; I want it admitted.

The Court: All right, he can do it after he leaves the stand, and let you know what his check is.

Mr. Olson: I wonder if they have the person who prepared that? Just from a glance at that, I can see where it would take several hours to check every name and date that's on this exhibit. Has your Honor seen it?

The Court: No, I haven't.

Mr. Holman: It's just the payroll.

(Testimony of M. E. Stickney.)

Mr. Olson: But just to check that, that he didn't make, to check that for accuracy, a man can't do that.

Mr. Holman: I don't want him to check it for accuracy.

The Court: I believe it is unreasonable, Mr. Holman, to put the burden on the opposing witness of checking a document as voluminous as that. I believe you should at least make him your witness and pay for his time. It might take quite a while.

Mr. Holman: I didn't think Mr. Stickney felt he was under any compulsion, your Honor. He was off the stand. If they don't want him to do it, it's all right with me. [665]

The Court: Well, I don't know; it would take me several hours to check this.

Mr. Holman: I'll have a witness, your Honor.

The Court: All right.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. On August 14, 1944, did you and Mr. Ashley and Mr. Macri have any conversation at the job office with respect to furnishing of lumber?

A. I don't recall whether we did that day or not.

Q. Now, isn't it a fact that the job office, the one Mr. Darcy says, the so-called office, the job office there, was adjacent to the lumber yard location? A. That's right.

(Testimony of M. E. Stickney.)

Q. And isn't it a fact that a person in the office has a view of the area that was used for lumber?

A. Not unless you step outside.

Q. Oh, you have to step outside?

A. There was a tool shed on the back that cuts your view.

Q. Anyway, it was so accessible that it was a matter readily before you at the time?

A. It was.

Q. How much lumber would you say was there when you came on?      A. I don't remember.

Q. Well, can you give me your best recollection?

A. In board feet? [666]

Q. Yes.

A. Almost impossible. I'll say there was some lumber there.

Q. Well, could you tell me whether there was a thousand, two thousand, five, or two hundred, or what? I mean unmade up.

A. Well, it would be a guess.

Q. Well, let's call it as "guestimate". Give me your best judgment.

A. Well, I'd say five hundred feet of ship-lap.

Q. Five hundred feet of board, ship-lap, not made up in forms?

A. As I remember; it's been a long time ago.

Q. Any two by fours?

A. I wouldn't know.

Q. Any plywood?      A. Not in sight.

Q. Not in sight?

(Testimony of M. E. Stickney.)

A. I never saw any plywood for quite some time. That was kept in Mr. Schaefer's little private shed they had for their tools there.

Q. In other words, Schaefer kept the plywood under a more direct control?

A. That's right; it was in a shed.

Q. Plywood was a scarce article?

A. Yes, sir, I imagine it was. [667]

Q. Now, at that time you can't recall any conversation between Mr. Ashley, Mr. Macri, and yourself with respect to lumber?

A. No, not then.

Q. Between then and the next time Mr. Macri came back on the job, had you had any conversation with Mr. Darcy with respect to lumber?

A. I think he ordered lumber shortly after I was there.

Q. Give you a list?                      A. That's right.

Q. And you sent it on?

A. I imagine I telephoned it; I'm not sure. Usually did.

(Whereupon, an order blank with certain writing thereon was marked Defendant Macri's Exhibit No. 56 for identification.)

Q. You had on the job, did you not, from the start, a form or pad for orders to be given by you or requisitions to be made by you, all headed "Verbal orders don't go; write it"?

A. I believe that's right.

Q. And handing you identification 56, I will ask you if that was not one such order with respect to transportation of men, while you were on the job? Read it here.                      A. Yes, it was.

(Testimony of M. E. Stickney.)

Q. That was the form of communication that you sent between [668] the job office and Macri and Company?

A. Under such circumstances as that, yes.

Mr. Holman: I offer this in evidence, your Honor, as illustrative of the witness' testimony. It is the form of communication that I wish. Shall I go on?

The Court: Wait a minute, have you offered that? Did you get Mr. Holman's last statement?

(Whereupon, the reporter read Mr. Holman's last statement.)

The Court: Well, give counsel a chance to examine it, and he can make an objection, if he has one.

Mr. Olson: If your Honor please, I don't see the materiality of this identification 56. Certainly it does not touch upon any subject matter that I dealt with. It purports to deal with a crew.

Mr. Holman: I said, your Honor, it was merely for the purpose of form of communication. The contents I do not claim has any binding effect upon the plaintiff at all.

Mr. Olson: It's not proper cross-examination.

The Court: I'll sustain the objection. If you wish to put in one of these blank forms as one that was used down there on the job "Verbal orders don't go; write it," I would consider it admissible, but this has matters on it and attached to it that



(Testimony of M. E. Stickney.)

I consider not relevant to [669] this matter. It would simply be encumbering the record.

Mr. Holman: May I withdraw the matters and strike the contents, your Honor? I don't have another form here.

Mr. Holman: I don't, your Honor.

The Court: Well, we can paste over the written matter, and take off the attached ones.

Mr. Olson: Your Honor, I won't rest my objection on the contents. What I'm trying to get at is I don't care to ask the Clerk to go to all that trouble.

The Court: Well, let's just draw a line through it, and the Court can disregard it.

Mr. Olson: I still object on the ground it is not proper cross-examination, but not on the contents of the letter, if that can be X'd out.

The Court: Just "X" out the part below the printed portion on the top; otherwise the objection will be overruled.

Mr. Holman: The signature may remain, your Honor?

The Court: Is it his signature?

Mr. Holman: Yes.

The Court: That's right, to show that he used that form.

(Whereupon, Defendant Macri's Exhibit No. 56 for identification was admitted in evidence.)

(Testimony of M. E. Stickney.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Didn't Mr. Macri have a conversation with you on the job with respect to keeping the lumber supply adequate? A. Not adequate, no.

Q. I'll ask you if you were not told to get from the superintendent of the Concrete operations any list they wanted, and 'phone it in, and it would be over as soon as it could be secured?

A. That conversation never happened, no, that I recall.

Q. And weren't you told further, Mr. Stickney, that if there was any emergency you yourself could buy any lumber you wanted in any of the local markets here? A. I was not.

Q. Sir? A. I was not.

Q. You were never given that instruction?

A. No, sir, not that I recall.

Q. Were you ever given any instruction to the contrary?

A. Yes, I was. I did ask for that permission one time.

Q. And it was denied you?

A. It was denied, yes.

Q. When—where?

A. Oh, sometime during the job.

Q. When and in whose presence was that?

A. Over the 'phone. [671]

Q. You talking from—

A. The office to Mr. Macri.

(Testimony of M. E. Stickney.)

Q. And talking to Mr. Macri in Seattle?

A. Yes, I remember the conversation.

Q. And when?

A. I wouldn't know; sometime during the job.

Q. Now, did you know that forms have to be re-used?      A. That's right.

Q. In order to make an economical operation?

A. I did.

Q. And did you know that Mr. Macri retained the title to the lumber after they were through?

A. I did not.

Q. You weren't told that; and did you know that lumber itself, both as to quality and as to quantity, was very scarce at that time on account of war emergency?

A. I knew lumber was scarce, yes.

Q. And didn't you know at that time that it took priorities to secure lumber?      A. I did.

Q. And you discussed the priorities with Mr. Macri, did you not?      A. I did not.

Q. And didn't you have a job priority available there yourself, Mr. Stickney? [672]

A. I believe I did use a job priority.

Q. Yes, sir; what was its number?

A. Not on lumber.

Q. What was its number?

A. I don't know; I can't recall the number.

Q. Didn't you have a job priority so that you could supply that job anything that you, Mr. Stickney, yourself, wanted for any portion of the performance?

A. There was a job priority there.

(Testimony of M. E. Stickney.)

Q. You never used it?

A. I used it somewhere, sometime. I remember using it for something, but it wasn't for lumber.

Q. Yes, sir. Now, didn't Mr. Macri tell you specifically to hire any and all kinds of help you wanted for your job? A. No, he did not.

Q. I see. Now, with respect to lumber again, didn't Mr. Macri tell you that if Schaefer's foreman, Mr. Schaefer's foreman, didn't give you enough time for you to order lumber from Seattle, for you to get it locally? A. He did not.

Q. I see, sir; and did Mr. Macri tell you to be very careful to give the Schaefer forces no chance to complain about either plenty of structures or plenty of lumber? A. He did not.

Q. All right, sir. Do you know approximately the quantity [673] pardon me, the number of structures that were poured, stripped and completed with back-filling while you were on the job?

A. No.

Q. Did you keep any record of that?

A. No record of that.

Q. You made no report to Mr. Macri on it?

A. No.

Q. Nor did Mr. Darcy or any of the Schaefer forces make any report to you? A. No.

Q. It is a fact, is it not, that you had hand shovels and mattocks and picks available for fine grading, for whatever crew you might desire?

A. That's right.

(Testimony of M. E. Stickney.)

Q. And it is a fact, is it not, that while you were there, none of the hoe excavations were retarded—pardon me—it is a fact, is it not, Mr. Stickney, that while you were there none of the hoe excavations for structures, structure excavations, were retarded because of lack of equipment?

A. Just for breakdowns?

Q. Oh, yes; well, there's always breakdowns on a job? A. That's right.

Q. Those were normal only, weren't they? [674]

A. I wouldn't say that.

Q. Was there ever a time when you asked for additional equipment? A. I did.

Q. When was that?

A. Shortly after I went there; I wouldn't know what date.

Q. Well, what did you ask for, Mr. Stickney?

A. I asked for a Cat, a Hoe, a ton and a half truck, and a pick-up.

Q. In other words, the equipment that Macri had there, you wanted replaced?

A. That's right.

Q. Well, did it work after you were there a while? A. Not very good.

Q. Well, did it work?

A. After a fashion.

Q. It did the digging, and it did the back-filling, didn't it? A. Not the back-filling.

Q. The Cat did the back-filling, didn't it?

A. Not while I was there; very little.

(Testimony of M. E. Stickney.)

Q. Oh, there was very little back-filling while you were there? A. Very little.

Q. Then there wasn't any really pressing use for the Cat [675] while you were there?

A. Not specifically.

Q. In other words, the Cat is attached to a 'dozer, and that pushes the 'dozer, and it is for the purpose of pushing considerable quantities of earth?

A. That's right; of course I needed it right along.

Q. Not in fine grading, did you?

A. Not in fine grading.

Q. I believe you said you left on December 9th?

A. Near as I remember.

Q. Now, it's a fact, is it not, that you neither notified Mr. Macri nor Mr. King that you were leaving? A. I did.

Q. Who did you notify?

A. I notified Mr. Macri first.

Q. How did you notify Mr. Macri?

A. By telephone.

Q. When?

A. I wouldn't now exactly; a few days before I left.

Q. Where did you call him, in Seattle?

A. Called him in Seattle.

Q. Sam Macri himself? A. That's right.

Q. I see. Well, with reference to your leaving on December 9th, and again may I give you the calendar, maybe we can [676] help you fix an approximate date at least.



(Testimony of M. E. Stickney.)

A. Oh, I wouldn't know; a few days before that, that's all I can tell you. I have no way of remembering what date.

Q. And did you notify him from the job?

A. From the job, yes.

Q. Did you notify Mr. King? A. Yes.

Q. On the job? A. On the job.

Q. Did you tell him, or did you write it?

A. I told him.

Q. Where? A. On the job.

Q. Where on the job?

A. I wouldn't know.

Q. Did you tell him when you were leaving?

A. Yes, sir.

Q. Wasn't it a fact, Mr. Stickney, that you had some malady at the time, wasn't it stomach ulcers, or something? You were suffering physically?

A. Not right at that time, no.

Q. Well, while you were on the job hadn't you suffered some physical disability?

A. Oh, I have for years.

Q. Well, while you were on the job did you suffer? [677]

A. Oh, as much as I have any time, yes.

Q. Then you did? A. Yes.

Q. And wasn't it because of that that you left the job? A. No, sir.

Q. And where did you go from there?

A. I went to Seattle.

Q. Back to Seattle? A. Yes, sir.

(Testimony of M. E. Stickney.)

Q. In other words, you didn't again return to the job after December 9th? A. No, sir.

Q. Were you subpoenaed in Lewiston, Idaho, to come here? A. No, sir.

The Court: He testified that he wasn't, didn't he?

Q. Oh, I didn't get that. And has your compensation been arranged, for your coming here?

The Court: He testified to that, too, I believe.

Mr. Holman: He testified to expenses before. I'm asking for compensation for time.

The Court: Oh, I see.

A. I don't know that it's been entered into, except as to expenses.

Q. What has been said? [678]

A. Just that the expenses would be taken care of.

Q. What expenses?

A. My expenses coming up here.

Q. How about your time?

A. I don't think there was any specific thing said about that.

Q. What do you mean, "specific thing"? What was said about it?

A. Said that my expenses would be taken care of.

Q. And there's been no arrangement made for payment of time to you whatsoever?

A. No.

Q. Nor have you asked any or contemplated any? A. No.

(Testimony of M. E. Stickney.)

Mr. Olson: I would be glad to submit my letter to Mr. Stickney. I have a carbon copy of it, if you wish.

Mr. Holman: It might be self-serving.

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Again, one more thing with respect to lumber, Mr. Stickney. With reference to these exhibits, Plaintiff's 45, 46, 47, and 48, you have looked at those during the recess hours, have you not, sir?

A. Yes, I've seen them.

Q. Was there any other plywood on the job except that type that is shown by those identifications? [679]

A. I saw some, yes.

Q. You saw some good plywood too, did you not?

A. I did.

Q. And these would be the type of plywood that were near the point of exhaustion, wouldn't they?

A. That's right.

Q. And is that so as an operation right along?

A. That's right.

Q. Now, was there any time that there was not plywood available to line the structure forms?

A. I don't believe there were while I was there. It never was ordered through me, I don't believe.

Mr. Holman: That's all, Mr. Stickney.

(Testimony of M. E. Stickney.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Stickney, you were instructed by Mr. Macri to do the fine grading on these excavations on 1062? A. Yes, sir.

Q. And you performed those to the best of your ability, did you? A. That's right.

Q. And whenever Mr. Darcy requested that you fine grade a particular excavation you went back and did that, did you not?

A. I made every effort to, yes.

Q. And on several occasions he made requests that you fine [680] grade this excavation instead of that one?

A. I don't recall anything like that.

Q. At no time did he direct you in the order of fine grading?

A. No, other than he told me maybe that such and such a structure needed fine grading.

Mr. Holman: Who is "he"?

Q. Darcy. Did he ever direct you to call Mr. Macri? A. About what?

Q. Lumber? A. Yes.

Q. And did he ever direct you as to the speed of excavation?

A. Not excavation; fine grade was entered into several times.

Q. Yes. He never complained about the speed of your excavating?

(Testimony of M. E. Stickney.)

A. Not the hoe operation; is that what you mean?

Q. Yes.           A. No.

Q. Did he ever complain to you about your fine grading?           A. Yes.

Q. And you took immediate steps to correct it whenever he complained?

A. As much as I could, yes.

Q. Now, in connection with fine grading, the proper time to fine grade out there in that project would be just before the structure is set, isn't that right? [681]

A. Well, it doesn't blow too bad, if that's what you're getting at.

Q. That's what I'm getting at, yes.

A. That dirt doesn't blow too bad, only in certain spots.

Q. You can fine grade it and leave it for two weeks and it will be all right?

A. That's right, in some sections.

Q. But not in all sections?

A. I wouldn't say so, no.

Q. This may not be proper cross-examination, I'm not certain, but did you recall Mr. Darcy or the Concrete Construction Company having any difficulty with the roads?           A. Yes.

Q. On many occasions?

A. Several occasions.

Q. And did the condition of the roads hinder their operations?           A. It did.

Mr. Hawkins: I think that's all.

The Court: Mr. Ivy?

(Testimony of M. E. Stickney.)

Mr. Ivy: No cross-examination, your Honor.

### Redirect Examination

By Mr. Olson:

(Whereupon, written statement of M. E. Stickney was marked Plaintiff's Exhibit No. 57 for identification.)

Q. I will ask you, Mr. Stickney, do you have a letter I [682] wrote to you requesting that you come over for this trial, with you?

A. I'm not sure whether I have that or not; I believe I have.

Q. Is this the envelope?

A. I believe it is.

(Whereupon, letter from Mr. Olson to M. E. Stickney was marked Plaintiff's Exhibit No. 58 for identification.)

Q. Mr. Stickney, showing you plaintiff's identification 57, I'll ask you to examine that and advise me whether or not your signature appears on that document?

Mr. Holman: Just a minute. Objected to as improper redirect.

The Court: Is this the statement he gave to you?

Mr. Olson: Yes, this is the statement that counsel interrogated the witness about.

Mr. Holman: Not one thing, your Honor. I read it and handed it back.



(Testimony of M. E. Stickney.)

Mr. Olson: Oh, no. He asked how it was dictated whether his wife objected to anything put in there——

The Court: Just a moment; go ahead.

Mr. Holman: I was going to say, I didn't interrogate him about any of the contents as such, merely the preparation of it.

Mr. Olson: Your Honor, he asked where it [683] was taken, and whether or not Mr. Darcy suggested the contents. It's true he didn't read the statement, but it is referred to and gone into on the cross-examination, and all about it, and now it seems to me if counsel wants to do that, then I'm entitled to introduce the document into evidence to which he was referring.

The Court: Well, I'll overrule the objection and admit it. I think there was testimony regarding its preparation, at any rate, and whether some suggestion wasn't made by the wife as to how it was to be answered, and so on. It does have a reference to the contents, anyway.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Is this the statement that was in your wife's handwriting as you testified.

A. That's right.

Mr. Olson: We offer plaintiff's identification 57.

The Court: However, I think it should be introduced merely for the purpose of explaining the

(Testimony of M. E. Stickney.)

circumstances of the making of the statement, and going to the bias of this witness. It isn't to be substantive evidence of its contents.

Mr. Holman: Under that circumstance I have no objection at all.

Mr. Hawkins: I object further on the ground it is [684] a prior consistent statement, and as such is not admissible.

The Court: Well, I haven't seen it yet.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Stickney, showing you plaintiff's identification 58, I'll ask you to state what that is.

A. This is a letter that I received from Mr. Olson, of Mr. Palmer's office in Yakima, Washington, asking me——

Mr. Holman: Just a minute, Mr. Stickney; I object to your telling the contents.

The Court: Yes, don't tell the contents; just tell what it is.

Mr. Olson: Well, we offer plaintiff's identification 58.

Mr. Hawkins: I don't see the materiality of that, your Honor, and I object to it for that reason. It is rather an innocuous document.

Mr. Olson: Well, if counsel goes into these things on cross-examination, I assume they feel they're material or they wouldn't examine with reference to them.

(Testimony of M. E. Stickney.)

Mr. Hawkins: I didn't cross-examine with reference to them.

Mr. Olson: I concede you didn't, Mr. Hawkins, but one of defense counsel did.

The Court: I think I perhaps ruled too hastily on [685] this other document here. Mr. Hawkins hadn't been given an opportunity to object. Is there any contention at all here that he has made a statement inconsistent with his testimony?

Mr. Olson: Well, I don't contend that he did, your Honor.

The Court: If there is any such, this should be admitted to rebut that, but as I recall the testimony, there isn't any evidence that his statement was inconsistent. I'll reverse my ruling on that, and sustain the objection to it, with that understanding. It is my understanding there isn't any evidence showing the statement was inconsistent. There is some showing of the method in which it was made, but I don't think there was any showing about the contents being inconsistent, or the contents at all; and 58, there isn't any contention that he's to be paid more than his expenses, so I will sustain the objection to that.

Mr. Holman: Your Honor—pardon me, I didn't mean to interrupt.

The Court: I was just going to say this; this identification is in here, and if it should be contended that he's to get compensation other than his expenses, this might be material at some future time, but I'll sustain the objection now. [686]

(Testimony of M. E. Stickney.)

Mr. Holman: Your Honor, in view of your Honor's change of position, I said I had no objection to 57, being offered as proof of transmittal but not substance, then Mr. Hawkins raised a different objection in which I would like to join.

The Court: Yes, you may join.

Mr. Holman: And then your Honor's ruling will be correct.

Mr. Hawkins: I think the witness should be advised if he expects any more. that he should claim it right now.

Mr. Olson: I suggest counsel leave that up to us.

The Court: All right, proceed.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Stickney, you testified on cross-examination with reference to the availability of men for fine grading, and the availability of picks, shovels, and mattocks. State whether or not there was anything else which was required by you in order to timely do your fine grading.

A. Transportation.

Q. And did you have the transportation?

A. I did not.

Q. And were you then delayed in your fine grading? [687]

A. Yes, sir.

(Testimony of M. E. Stickney.)

Q. And when Mr. Darcy requested you to return with your fine graders and do some fine grading on some holes back, were you able to do that promptly?

A. Not very promptly, as a rule.

Q. Now, with reference to the holes that were dug by hand, and counsel asked you about on cross-examination, asked you if they were dug right, what was the situation with reference to the slope, if any, on those holes?

A. They were dug the same as the others.

Q. And that's how?

A. Vertical banks, one foot outside of the neat concrete line.

Q. Now, you said that you called Mr. Maceri on the 'phone on various occasions concerning lumber. Do you know about how often you would do that?

A. Well, that depends on—when he would order the lumber I would call him repeatedly until I got the lumber.

Q. Well, how many times would you call him, say, in a week's time?

Mr. Hawkins: Your Honor, I may be mistaken, but I thought I asked the witness that very question and he couldn't remember.

A. I couldn't say correctly.

The Court: Well, he's answered the same [688] way, that he can't remember.

A. Not correctly.

The Court: All right, go ahead.



(Testimony of M. E. Stickney.)

Mr. Olson: Your Honor, he's testifying to a different thing. Counsel asked him how many times he ordered the lumber. Now he's referring to how many times he had to call up to get the lumber after it was once ordered, as I understand it.

The Court: Well, ask him the question, then.

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Do you recall, Mr. Stickney, approximately how many times after you had ordered the lumber you would have to call, say in a week's time, about it's non-delivery?

A. Well, that varied.

Q. Well, from what to what?

A. Well, it depended on what time we would receive the lumber, and what time the order was given.

Q. Well, would you have to repeatedly call Mr. Macri to get your lumber?

A. I wouldn't say every time, but a great many times, yes. I wouldn't say a good many times, because there wasn't a good many times ordered, but whenever it was ordered, why, I don't recall any time getting it the first time I called for it, right now.

Q. You referred also on cross-examination with reference to [689] some conversation over the 'phone with Macri as to giving you authority to buy some lumber locally. Now, I understood you to say you remembered some specific conversation?



(Testimony of M. E. Stickney.)

A. We did have some specific conversation about that.

Q. Would you relate what it was?

A. Well, I can't say exactly what it was.

Q. Well, the substance of it?

A. Only that I was denied the privilege to buy the lumber as we needed it, because he was supposed to have plenty of lumber over there, and there was no use; that was his excuse, as I remember it.

Q. Now, when you were out on this job it was during the summer, is that right?

A. That's right.

Q. What was the situation with reference to it being windy out on the project during August and September?

A. There was quite a number of windstorms, yes.

Q. There were some windstorms? A. Yes.

Mr. Olson: That's all.

#### Recross-Examination

By Mr. Holman:

Q. Mr. Stickney, you've answered counsel on your redirect that transportation of the men was the thing that was preventing you from doing fine grading? [690]

A. That's right.

Q. Didn't you have a pick-up truck yourself?

A. I had a pick-up truck, yes.

(Testimony of M. E. Stickney.)

Q. And didn't you have a pick-up truck for the men? A. Not for the fine grade crew.

Q. Well, for the men?

A. For Jim Black, yes.

Q. Jim Black, and he was a fine grade man, wasn't he?

A. Not altogether, as I stated before.

Q. Well, didn't you tell me you put him on for fine grading?

A. That was the idea when I hired him.

Q. You mean Black's truck wasn't large enough for this crew?

A. Black had to stake out ahead of the hoe, and he couldn't stake and keep switching back and forth, because fine grading, a man's got to be with his crew every second.

Q. Didn't you make a request for a pick-up truck? A. Not——

Q. That was the difficulty that you and Mr. Black had between yourselves on the job, that you solved yourselves on the job?

A. I just don't understand you.

Q. I'll strike the question; maybe it is confusing to you. That matter was one that you and Mr. Black handled yourself on the job, the matter of getting the men back and forth? [691]

A. That's right.

Q. And you did your best to do it, did you not?

A. Yes.

Q. And you used all the transportation facilities you had? A. I did.

(Testimony of M. E. Stickney.)

Q. And the transportation facilities you had were for that purpose? A. I did.

Q. And you made no requisition for any additional transportation?

A. I made no requisition, but I made demands.

Mr. Olson: What do you mean by requisitions?

Mr. Holman: I think the witness knows.

Mr. Olson: Well, he testified he made request for a truck and a pick-up truck.

The Court: Just a minute; you may have him explain. Requisition has a common meaning.

Mr. Holman: You ask me to explain to him requisition?

The Court: No. The term requisition I think has a common meaning, and if it has other than that, counsel for the plaintiff may bring it out on redirect. You may go ahead.

Mr. Holman: I have no more questions.

The Court: Mr. Hawkins? [692]

### Recross-Examination

By Mr. Hawkins:

Q. Did Mr. Darcy ever given you a written order or a bill of materials that he needed?

A. Yes.

Q. And did he ever give you that, say, two weeks before he needed that material?

A. I believe he has.

Q. On how many occasions?

A. You mean how many occasions that far ahead?

(Testimony of M. E. Stickney.)

Q. On how many occasions did he give you such bill of material two weeks in advance?

A. As I recall, there usually was an order for lumber in the office all the time.

Q. But you don't recall how many occasions he gave you a bill of materials two weeks in advance?      A. No.

### Recross-Examination

By Mr. Holman:

Q. Did Mr. Darcy at any time give you a written notice of any defects in the construction?

A. No.

Q. In the excavation?      A. No.

Q. Sir?      A. No.

Q. Or in the fine grading?      A. No. [693]

The Court: Is that all for this witness? Then may he be excused?

Mr. Olson: Yes, may Mr. Stickney be excused?

The Court: You mean from attendance? I meant from the stand. Is there any objection to the witness being excused?

Mr. Hawkins: I have no objection to the witness being excused.

Mr. Olson: You may step down.

Mr. Holman: Just one minute. We have no objection to his going, your Honor.

The Court: You may be excused from further attendance on the court, then, Mr. Stickney.

(Whereupon, there being no further questions, the witness was excused.)

The Court: It is too late, I think, to call another witness before recess. Today I'm going to take a two-hour recess. We'll recess until 2 o'clock, and then continue in session until 4:30 instead of 4 o'clock.

(Whereupon, the Court took a recess in this cause until 2 o'clock p.m.) [694]

Yakima, Washington, Friday, February 28, 1947,  
2:00 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, before counsel calls his next witness, with his consent I would like to have Macri's 55 identified for the purpose of introduction by calling Miss Callahan.

Mr. Hawkins: May I address the Court?

The Court: Yes.

Mr. Hawkins: Your Honor, Mr. Henry found his assignment finally, and sent me a copy of it, and I'm not offering it in evidence at this time, but I'll hand it to the Clerk so it will be possession of the Court. It will be offered at an appropriate time, and I am also offering the copy of the contract hardship claim by Macri and Company. That will be offered at a later time. I want that letter to go with it. I have in my hand the claim from which that copy I handed the clerk was prepared. This is a file of Depew and Ferguson, in Seattle, who represent the Macris in this particular matter. Apparently it is the only instrument in existence except the ones in the hands of the government.



officials, and I would like permission to withdraw that and return it to Depew and Ferguson so they will have their file complete. [695] My girls have prepared this copy, and have proof read it.

The Court: How soon did they want it back?

Mr. Hawkins: Well, as soon as they can get it back.

The Court: Well, I wouldn't like to let the originals go until the other counsel have a chance to examine them and concede that it is a true copy. We might get in a position where they would object to the copy.

Mr. Hadkins: This is just a copy itself, your Honor, not the original. The one that I have from Depew and Ferguson is a carbon copy of the original.

The Court: But it is the only copy; I understood it was agreed by everybody here that a copy from that office could be put in here; that is, there wouldn't be any objection so far as being a copy is concerned.

Mr. Hawkins: Mr. Goerig says it will be all right to leave it here until Tuesday or Wednesday, and everyone can have an opportunity to look at it.

The Court: And when you introduce it, I'll give you permission to substitute a copy.

Mr. Olson: As far as Mr. Schaefer is concerned, if Mr. Hawkins says what he has is a copy of the instrument, we will raise no objection to it.

Mr. Hawkins: My secretary checked it. That probably [696] has more probative value than my statement.



ELIZABETH CALLAHAN

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your full name, please, and you'll have to talk loud, Miss Callahan.

A. Elizabeth Callahan.

Q. Where do you reside? A. Seattle.

Q. And what is your employment with Macri and Company?

A. I'm the general office worker.

Q. And in connection with the Macri payrolls for the Sunnyside job, specification 1062, schedule 1, I'll ask you whether or not under my direction you prepared what has been marked Macri's 55 for identification, either prepared it or it was prepared under your direction?

A. Yes, it was prepared under my supervision; part of it I did.

Q. Part of it is actually your writing, and the rest is under your supervision?

A. And I checked it.

Q. Now, with reference to the first page of 55 for identification, is that a full and complete showing including the breakdown detail of the checks of the various men, as to medical aid, withholding tax, and so forth and so on, [697] and the net amount and the ultimate payment? A. Yes.

Q. Then when you turn to the second page and the subsequent pages have you left that detail off?

A. Yes.

(Testimony of Elizabeth Callahan.)

Q. You did that at my direction, but does the account throughout show the amount paid the men and the check by which they are paid?

A. Yes.

Q. And that covers for what period of time, Miss Callahan?

A. From the week ending August 16, '44.

Q. Which would begin on what date?

A. Would begin on the 10th.

Q. All right, to and including which date?

A. To and including the week ending December 13, '44.

Mr. Holman: You may inquire, counsel.

Mr. Olson: I have no questions.

Mr. Holman: I may not have asked you this. I should. Is this a full, true, and correct copy of the payrolls themselves? A. Yes, sir.

Mr. Holman: I offer it in evidence, your Honor, in conjunction with the direct and cross-examination of the witness Stickney, to show the men actually employed and the pay actually received by those men for that [698] period.

Mr. Olson: Your Honor, I object to its introduction, first, that if it is a true and accurate and complete copy of the payroll for those periods, it is then not the best evidence as far as that period is concerned, that is, if it is a complete copy it certainly isn't offered as a compilation, and secondly, that it is a self-serving document, fully immaterial, doesn't relate to or prove any of the issues that are framed in this case.

(Testimony of Elizabeth Callahan.)

The Court: If it is a copy it seems to me that it is subject to the objection that it isn't the best evidence.

Mr. Holman: If counsel raises that, I don't urge it, because it is very evident that I had the copy, and I understand when Mr. Stickney was checking it, counsel made the suggestion that we have it checked by our own people and vouched for. If he raises the question it is not a copy, I'm not going to urge that.

The Court: Why not follow the usual procedure of offering the original and substituting a copy?

Mr. Holman: If I do that I'll have to take the breakdown of each one of these checks, in other words, total amount earned, total of old age benefits, medical aid, withholding amount; on the subsequent it doesn't [699] show; on the payroll it does, for every man, all the way through. Miss Callahan testified that at my direction she omitted these items, which can't be pertinent in this case.

The Court: It isn't an exact copy, then?

Mr. Holman: It is not.

Mr. Olson: I thought she said it was. That's the point I make, that if it was an exact copy, then I preferred that the originals went in; if it is a compilation, that's a different matter.

The Court: It doesn't appear to be a compilation. It appears to be a partial copy, with some items omitted.

Mr. Holman: Your Honor, the first page is a complete copy of that page of the payroll. The

(Testimony of Elizabeth Callahan.)

subsequent pages leave off the breakdown of the man's deductions. I can have Miss Callahan complete it, if necessary. In view of counsel's objection, your Honor, I'll withhold the offer, and I'll ask Miss Callahan to complete this in its entirety.

Mr. Olson: Your Honor, I don't wish to require that. I think I now understand what counsel is doing.

The Court: I am not sure that I do.

Mr. Olson: Well, as I understand, there's some information on the original payroll that counsel has omitted from this compilation. Except for that omitted, [700] the rest is a complete copy.

The Court: What is omitted?

Mr. Holman: The breakdown, your Honor, of the deductions for Federal Old Age Benefits, medical aid, and withholding tax, and total deductions; that would be those deductions carried through.

The Court: Are they just noted in the copy, and not itemized?

Mr. Holman: They are not shown, except on the first page by way of illustration. It is pure detail, if counsel wants it.

The Court: It does contain the names of all employees?

Mr. Holman: Their wage, and the time they worked, and the check they paid them with, so that if they want any particular man, we can produce the check.

The Court: Have you any objection?

(Testimony of Elizabeth Callahan.)

Mr. Hawkins: Yes, I do. I object to the introduction of this exhibit as proof of the fact that these individuals worked on that job. I do not see how that can be proved by this document. I think that could be proved only by the men themselves, or by the superintendent who was there at the time. This is merely hearsay, twice removed, if it is offered in proof of that matter. [701]

Mr. Holman: It is offered, your Honor, in furtherance of Mr. Stickney's identification of the payroll sheets that are now reproduced.

The Court: Well, I thought the purpose of Mr. Stickney's cross-examination on the payroll was to show that he himself worked and what his salary was, and also that he had authority to hire others, and that he had done so, and that he had hired them and turned in their time on this payroll, and it is my understanding that he didn't identify every sheet of this payroll.

Mr. Holman: He did for the time he was there, I think, your Honor, in the record. At least I asked him to.

The Court: Well, didn't everything you asked him about that go in, oral evidence?

Mr. Holman: Except the detail, your Honor.

The Court: I thought he was just consulting that to refresh his memory, and then was testifying as to what salary he got and what men he employed.

Mr. Holman: I didn't ask him page by page, for the mere purpose of saving time, but your Honor will recall that he did identify it, and started checking on this one to approve it.



(Testimony of Elizabeth Callahan.)

The Court: He got part way through, and then didn't finish. It is my understanding that it isn't in [702] the record that these men shown in the payroll worked on one of these sub-contracts, 1062 or 1068.

Mr. Holman: Not by Mr. Stickney's statement, except that that was the payroll for that period.

The Court: Well, wasn't he superintendent on other work besides these two sub-contracts?

Mr. Holman: 1062 is all. I don't think he was on 1068 at all. Did you have him testify to 1068?

Mr. Olson: I didn't have him testify to 1068 at all.

The Court: I'm not sure about this, I don't know whether it's been brought out in the evidence; did Mr. Macri have a contract that covered portions of the Roza Project other than 1062 and 1068, or were his operations confined to those contracts?

Mr. Holman: That's correct, 1062, schedule 1, and 1068 were the two contracts.

The Court: And you're offering this for the purpose of showing these men worked on the job?

Mr. Holman: No, your Honor; for the purpose of showing the payroll for that period while Mr. Stickney was superintendent.

The Court: And how is that material?

Mr. Holman: It is material as a defense in refutation of Mr. Stickney's statement that there was a [703] shortage of manpower.

The Court: What was your understanding as to how thoroughly this was identified, Mr. Hawkins, if I may ask?



(Testimony of Elizabeth Callahan.)

Mr. Hawkins: Well, my understanding on that, your Honor, was as your Honor just stated; this man used that exhibit to refresh his recollection, and I do not believe he testified that all of the men on that payroll worked the days indicated and were paid the amounts indicated, and that is the point I'm getting at, of course.

Mr. Holman: All I asked him was if it was a true payroll for that period, and he said it was.

The Court: I don't see how he could say that, because he didn't check it all.

Mr. Holman: He checked this one, the payroll, himself, and said it was in his own handwriting.

Mr. Hawkins: Counsel says he's offering this as proof of the payroll. I fail to see the distinction between that and offering it as proof the men worked on the job and were paid a certain amount, and I don't think there's been sufficient evidence to qualify that, as yet.

The Court: I don't believe it has been sufficiently identified.

Mr. Holman: With the Court's permission, I thought I had the cooperation of counsel, but I guess I [704] didn't, I'll ask the privilege of withdrawing the exhibit and delivering it to Miss Callahan for the purpose of completing it so it may be completely identified, and then I'll leave it until the testimony completely supports it. Will you leave the stand, Miss Callahan?

(Whereupon, the witness Elizabeth Callahan was temporarily excused from the witness stand.)

(Whereupon, Certificate of Assumed Business Name was marked Plaintiff's Exhibit No. 59 for identification.)

Mr. Olson: If your Honor please, I offer in evidence plaintiff's identification 59, which is a certified copy of the certificate of assumed business name filing of the Concrete Construction Company, which has already been submitted to counsel as having been filed February 27, 1947.

Mr. Hawkins: February 27?

Mr. Olson: Yes, that's yesterday. I appreciate that counsel is—I'm not asking them to concede it is timely filed, neither am I conceding that it is necessary to file it, but there is rather an interesting set of cases on the State law, which I think is entirely inapplicable, but I would like to have it shown that it was filed on that date.

The Court: It is conceded that there was no filing [705] other than that time? What is that identification number?

Mr. Olson: 59.

Mr. Hawkins: Your Honor, we object to the admission of plaintiff's identification 59 into evidence for the reason that it is incompetent to comply with the State law. If the State law is applicable in this Court on this matter, filing the assumed name may be done at any time prior to the commence-

ment of the trial, but I know of no case that holds that filing of it during trial was sufficient compliance with the statute.

Mr. Olson: No case that says it isn't, either.

Mr. Hawkins: The statute itself is very explicit that no one can maintain an action unless that has been done. I take it if the language of the statute was followed then there would be no alternative but for the Court to dismiss the case. Whether or not the statute may be construed later to mean that filing during trial is sufficient, I don't know. I think the bare wording of the statute plus the cases to date would indicate that a filing at this time is too late, and for that reason we object to its admission in evidence.

Mr. Holman: We join, your Honor.

The Court: Well, we have rather a peculiar situation here. I think that there are two questions, [706] at least, that are raised by this failure to file a trade name certificate. One is whether that law is applicable to an action such as this, in Federal Court. The other is, if it does apply, whether the objection must not be raised by demurrer or answer prior to the beginning of the trial; in Federal Court that would be a motion for dismissal or answer. It is not in the answer, and I wasn't in this case from the beginning, and it is my understanding that it hasn't been raised; at least the pleadings don't indicate it was raised, and since there are cases which hold the objection wasn't timely, I'll overrule the objection and let it come in for what it may be worth, if anything. I don't know, frankly.

Mr. Olson: I'll just feel a little better by knowing it was done.

Mr. Hawkins: I don't like to weaken my own position in this respect, but it occurred to me possibly the situation of a foreign corporation suing in the Federal court, where it had not complied with the State laws, might be in point. I checked those cases, and apparently there is a division of authority. Some say the State legislature has no power to affect the jurisdiction of the Federal court, and therefore the failure cannot prevent its maintaining an action in Federal court. There [707] are other cases which hold to the contrary. I just suggest that there is a line of cases that might be some help.

The Court: Well, thank you. Frankly, I am inclined to think that this certificate, to have any effect, must be filed prior to the trial, but I'll let it in for what it is worth.

Mr. Hawkins: I had the identical situation in Judge Findley's court in Seattle, and the offer was made during trial. Of course, that had the effect of amending the pleading and also of amending the answer, to the effect it had not been properly complied with. I think if this is admitted it can be admitted only to the effect that plaintiff's complaint be, by implication, amended to plead a compliance with this law, and I think by the same token the defendants are entitled to amend their answers to deny a compliance with the state law, and in that regard I so move at this time.

Mr. Holman: I join, your Honor.



The Court: I think that's a reasonable position. The complaint would have to be construed as amended to conform to the proof here. There is no allegation that the certificate was filed, and it is so considered, that it will be amended to show the filing as of this date, and it will be understood that the defendant's answer [708] will be considered to show that it was not proper compliance.

Mr. Olson: I also intend to show that at the time of the deposition of Mr. Schaefer on September 27, 1946, all the parties had full knowledge that Mr. Schaefer was the sole owner of the Concrete Construction Company, and that there could be no possible prejudice against any of them. I'll show that at the proper time. I guess the deposition is on file now.

The Court: Was that after the commencement of the action?

Mr. Olson: That was after the commencement of the action, but long before the trial, and as counsel says, the cases do show a filing before trial is timely. There are no cases that I have been able to find that hold either way that you cannot file during trial. They do hold that filing up to trial is timely. My position is that it is timely in view of the deposition, in which they were advised of all the facts. That's assuming, of course, that the State law has some applicability.

The Court: Well, I'm letting it in, but I'll keep an open mind on it during the trial.

(Whereupon, Plaintiff's Exhibit No. 59 for identification was admitted in evidence.) [709]

## FRED WALTIE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Olson:

Q. State your full name, please.

A. Fred Waltie.

Q. And how do you spell your name?

A. W-a-l-t-i-e.

Q. Are you the gentleman, apparently, who was referred to in some of the field reports as Mr. Wittie?

A. That's right.

Q. At least, you were on the job at the time that they referred to Wittie?

A. That's right.

Q. I thought we ought to tie that up. Mr. Waltie, by whom are you employed now?

A. State Highway Commission of Oregon.

Q. Are you in any way connected with Mr. Schaefer's operations?

A. No.

Q. When did you go to work on 1062, if you did?

A. In April of '44, I believe. [710]

Q. When with reference to the commencement of operations by Mr. Schaefer?

A. Well, it was shortly after he took the contract, although there had been some work done previous to his taking the contract.

Mr. Holman: May I have that answer?

(Whereupon, the reporter read the last previous answer.)



(Testimony of Fred Waltie.)

Mr. Holman: I move that last portion be stricken as volunteered, your Honor.

The Court: It may be stricken.

Mr. Olson: Then, so that I'm clear, the part that's left in is that it was shortly after Mr. Schaefer took the contract?

The Court: Yes.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you recall, Mr. Waltie, and will you describe, whether or not there were any excavations completed with fine grading when you went on the job? A. No.

Mr. Olson: Now, I'm not sure that answers it. I think my question was a little bit double.

The Court: Well, clarify it if you wish.

Q. Were there excavations there fine graded, Mr. Waltie? A. No. [711]

Q. And would you describe what the situation was with reference to the excavations as you saw them when you went on the job?

A. Well, they hadn't been started yet.

Q. The excavations had not yet been started?

A. No.

Q. What was the experience you had with the excavations as they were when they were commenced by Macri Company?

A. Well, they weren't accurate.

(Testimony of Fred Waltie.)

Q. I don't know if I asked you, were you Mr. Schaefer's superintendent on the job?

A. Yes.

Q. And in what respects were they not accurate, Mr. Waltie?

A. Well, they were just not dug properly.

Mr. Holman: I move that be stricken as a conclusion, your Honor.

Mr. Olson: I'll try to get it. Describe the banks.

Mr. Holman: Well, just a minute.

The Court: I think that the answer may be stricken, that they were not dug properly. It's a conclusion.

Q. Describe the conditions of the banks on the excavations.

A. Well, they were cut vertically instead of on a 1 to 1 slope.

Q. Now, describe the fine grading as it was performed by [712] Macri and Company.

A. To actually define it—well, it just wasn't right.

Mr. Holman: I move that be stricken, too, your Honor.

The Court: Well, that will be stricken. You'll have to describe it, Mr. Waltie. You see, I can't tell what your conception of what wasn't "right" was, and the record doesn't indicate.

Q. If it wasn't right there must have been something wrong with it, Mr. Waltie. What we would like to have you do is explain what it was.

(Testimony of Fred Waltie.)

Mr. Holman: Object to that as leading and suggestive.

The Court: Well, you can ask him what the condition was.

Q. Just explain what the condition was with reference to fine grading.

A. Well, the fine grading was not brought to the proper levels, in some instances either too high or too low, and the side cuts, that is, of the structure itself, were inaccurate, that is, they were not cut—they were cut back too far or not far enough.

The Court: Does this testimony still relate to April, 1944?

Q. Well, this relates to the first excavations which were [713] done. When were these, Mr. Waltie?

A. I believe it was the first part of June. That could be referred to on the reports that I made at that time.

Q. I wonder, Mr. Waltie, if you would step down to plaintiff's exhibit 23 and 25, and remove the exhibits inside, if you wish, and explain, Mr. Waltie, what walls you refer to were not to grade, or what elevations were not to grade, using this exhibit 25 as a model?

A. This is just an illustration, because I wouldn't say that would be in any one particular case, but this elevation was wrong, or this elevation, or by side cuts I meant this particular part here, was either left too far out, or it was cut back too far, and the same thing pertains to this one.

(Testimony of Fred Waltie.)

The Court: You should refer to numbers.

Mr. Olson: I wonder if we couldn't have those sub-elevations marked?

The Court: They are marked.

Mr. Olson: Well, as I understand it, 25g is simply the slanting part of that elevation.

The Court: Yes, I think that's right.

Mr. Olson: The sug-grade itself I don't believe is identified, if I correctly understood the markings.

The Court: Yes, that's right. [714]

(Whereupon, portions of plaintiff's Exhibit 25 were marked 25h, 25i, 25j, and 25k.)

#### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Waltie, in describing those sub-elevations would you again, using this Exhibit 25 as a model, illustrate by referring to them by number and sub-letter the elevations that you refer to?

A. Well, 25k would be wrong.

Q. And in what respect, Mr. Waltie?

A. It would either be too low or too high.

Q. All right.

A. And 25h would either be low or too high, which also is the case with 25i and j.

Q. Now, how about the sub-wall or curtain walls, I believe, as they were referred to, being 25c and 25d; were those excavated by Macri and Company on the excavations as you found them while you were superintendent?      A. You mean——

Q. Im talking about 25c and——

(Testimony of Fred Waltie.)

A. Oh, no, I never encountered one of those.

Q. And what would you have to do about the excavations before you put the forms in, if anything?

A. Have to have one of the carpenters dig that.

The Court: What are those slots called?

Mr. Olson: Sub-walls, I think. [715]

Q. Now, how about the excavations in any other respect, Mr. Waltie, as compared with the specifications?

A. Well, this 25b could either be cut back too far or not far enough.

Q. And what would you have to do to correct those situations, if anything?

A. Well, in some cases if they were cut back too far we had to crib the wall of 25b so that the earth could be put back in there.

Q. What do you mean by crib the wall of 25b?

A. Well, you put a form up there in reverse. What I mean is, to create a flat surface here for the concrete to go against, and still retain the earth that is loose.

Q. And could you leave that cribbing in there after you poured the form?

A. It was definitely against the rules and regulations of the Bureau.

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, I'll strike the answer.



(Testimony of Fred Waltie.)

Q. That cribbing, when it was put in there, Mr. Waltie, would that have to be removed or could it be left there before the forms were poured?

A. Well, it couldn't be left there.

Q. And after the cribbing was put in place would you have to do anything with reference to filling in any space in [716] there in the soil?

A. Well, we had to place the dirt in there, yes.

Q. And describe that process; in other words, just tell what you had to do, Mr. Waltie.

A. Well, you had to shovel in dirt, and it was supposed to have been compacted, although I never actually did do that any instances that I done that.

Q. Now, how about 25g and 25f and 25e; were those parts of the excavations performed when you got to the excavations? A. No.

Q. And who performed that work?

A. The carpenters on the Concrete Construction crew.

Q. Were all the excavations on the job that you worked on exactly like Exhibit 25? A. No.

Q. But did the other structures have sub-excavations and curtain walls and the other fine grading?

A. Not all of them, no.

Q. Some of them didn't; all right, you may return to the stand. Now, when you first come on the project what was the first thing that you started to do as far as Concrete Construction Company, what was the first work you were doing?

A. Building form panels.

Q. Building forms? [717]

A. Form panels.



(Testimony of Fred Waltie.)

Q. And where was that done?

A. At the yard site.

Q. What was the situation with reference to stock piles of lumber on hand?

A. Well, I wouldn't say as to immediate arrival, but shortly thereafter that we were out of lumber of certain sizes.

Q. And did that delay your operations any?

Mr. Holman: Oh, I object to that as leading, your Honor.

The Court: Well——

Q. Explain how that affected your operations, if it did?

A. Well, we couldn't complete panels, or make panels enough to complete structures so that we could set them.

Q. What was the quality of the lumber that was furnished you? Describe that.

A. Well, it was new lumber.

Q. And by that what do you mean?

A. Well, it was average lumber that you'd buy.

Q. Well, was that suitable for forms?

A. Yes, it was.

Q. And was that true with the lumber throughout the time you were on the project?

A. Well, as a matter of fact, that's the only lumber that was on the project while I was there.

Q. When was the first excavation ready, or when were you notified, if you were so notified, that the first excavation was ready for installation of forms?

(Testimony of Fred Waltie.)

Mr. Holman: Just a minute, your Honor, I object to that question until there is a showing of necessity to notify. You mean notified by your crew?

Mr. Olson: No, by Macri and Company.

Mr. Holman: I object to that. There is no necessity for notice.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: My objection to the question is there is no obligation on the principal contractor to notify the sub-contractor anything, so therefore it is immaterial.

The Court: I'll sustain the objection to the question in that form, until it is shown that he was notified, or if he was notified.

### Direct Examination

(Continued)

By Mr. Olson:

Q. Were you notified, Mr. Waltie, by Mr. Macri's employees, or one of his employees, that an excavation was ready for concrete forms?

A. Yes.

Mr. Holman: I have no objection to that. That is factual. [719]

Q. Do you recall the approximate date that you were so notified?

A. It was the first part of June. I'm not sure of that either; it's on the records.

(Testimony of Fred Waltie.)

Q. Well, we have the records. Are those the records you kept yourself? A. Yes.

Q. Referring to plaintiff's identification 52, Mr. Waltie, and to that part of those records pertaining to the time you were on the job, were they prepared by you? A. Yes.

Q. Well, now, would you refer to the sheet covering April 14, 1944?

The Court: You're just using this to refresh the witness's memory, I assume.

Mr. Olson: Yes, that's correct, your Honor. I thought rather than have him thumb through all those papers, I would direct him to that page, if my note is correct.

The Court: All right.

A. That's what date?

Q. April 14, 1944. Is there a notation—or, refreshing your recollection from notations which may appear on that page, Mr. Waltie, was there any notification given to you with reference to excavations? [720]

A. It doesn't on the 14th, but it does on the 15th.

Q. All right, on the 15th.

A. The notation—shall I read that?

Q. No, just simply read it, if it is your record made at that time, to refresh your recollection, and then tell me, were you notified, and on what date, that an excavation was ready for structure placing.

A. I was notified on the 15th that——

Q. Of what month?

A. Of April, 1944, that one structure hole was completed on April 14, 1944.

(Testimony of Fred Waltie.)

Q. Now, who told you that, if you know?

A. Mr. Staples.

Q. And he was who?

A. Superintendent for Macri and Company.

Q. What did you then do, if anything?

A. I went up and checked the hole.

Q. And what did you find?

A. Well, I found it wasn't excavated to the grades it should have been; that the walls were cut vertical.

Mr. Holman: Your Honor, I again move that the testimony of the witness with respect to what it should have been be stricken. In other words, let him tell what——

The Court: Well, that part will be stricken and disregarded. Just tell what it was. [721]

Q. Just describe the excavation as you saw it with reference to the banks and with reference to the grades.

A. Well, the banks I remember definitely were cut vertical, but the grades, I don't remember definitely whether they were up or down, but there was something.

Q. Do you recall whether or not they were worked on before the structures were put in place?

A. Yes, they were.

Q. And do you recall whether or not the Concrete Construction Company did the work, or Macri and Company did the work?

A. Macri Company had, or sent some of his crew to do more of the hand excavation, and after

(Testimony of Fred Waltie.)

they left there was still more to do, and that Concrete Construction Company's men had to do.

Q. Would you just relate what occurred between yourself and Macri Company with reference to the fine grading or hand grading, hand excavation in these excavations, the forepart of the job?

A. Well, we tried to work together on it and get things straightened out so there would be no trouble in the future, if that's what you meant.

Q. Well, you say you tried to work together. Just what did you do, Mr. Waltie?

A. Well, Mr. Staples was very busy with the shovel and didn't have time to take the fine graders, so I took them and [722] used them under my direction wherever possible, and also in a manner to teach them how to figure the elevations and to fine grade so that we wouldn't have any trouble.

Q. And you did that over how long a period of time? Just what experience did you have in that regard?

A. Well, it was actually the whole period that I was on the job, but I didn't have the men from Macri all that time; they were withdrawn and put on some other work, presumably.

Q. Did you have the same men to work with, of Macri's, each time, or not?           A. No.

Q. Now, when did you first start setting structures in the excavations? You may refer to your records there to refresh your recollection if necessary.

A. Well, I think it was April 15; I'm not sure.



(Testimony of Fred Waltie.)

Q. Speak up, Mr. Waltie, when you're ready to answer. Structure forms, I'm talking about, not the concrete part of the structure.

A. That would be on April 17, may I change that? That was April 17 that it was completed. It was on April 15 that it was started.

Q. Is that the same day, then, that you were notified that the excavation was ready?

A. Yes.

Q. Now, how much time, on an average, if any, did your men, [723] your carpenters, spend in excavating in order to put in the structure forms?

A. You mean with reference to each hole, or as a whole?

Q. Well, any way that it should be answered, Mr. Waltie, if you give it to us by the whole, or on the average.

A. Well, on an average I'd say at least twice as long as it should have taken to construct the forms.

Q. Now, with reference to the time put in on excavation work itself by the carpenters, can you tell us what time was spent, if any, by the Concrete Construction Company in excavating or doing the fine grading in order to put in your structure forms?

A. Well, in one particular hole I remember there was more than eight hours of actual excavation time, and the excavating wasn't complete yet.

Q. Well, that's with reference to one excavation. How about the rest of them?

A. Well, there was a variance in the actual time, which I wouldn't quite remember.



(Testimony of Fred Waltie.)

Q. Were there any of them that did not require any excavation by the Concrete Construction Company? A. Not that I remember of.

Q. Now, did you during the fore-part of the job work right with Mr. Macri's men in making this fine grading? A. Yes. [724]

Q. And state what was the situation with reference to the ability of these men to read the structure layout plans and to make the excavation conform to those plans?

A. There was no one in the fine grading crew that had the ability to read plans and lay them out properly.

Q. Now, you went off of the job on what date, approximately?

A. On August 10 or 12 or somewhere in there.

Q. August 10 or 12 of what year? A. '44.

Q. And approximately how many structure forms had been built when you left?

A. I could tell, I imagine, by going back through these reports, but I don't actually remember for sure. It would be somewhere in the neighborhood of 75.

Q. That's all I wanted, was an approximation; and had there been, was there, some concrete poured while you were there? A. Yes.

Q. What was the situation with reference to the excavations ahead of you being ready when you were moving along with your structure form placement crew?

(Testimony of Fred Waltie.)

A. There was actually no improvement over what had been going on at the start.

Q. Did you make any complaints to anyone?

A. Yes.

Q. And to whom? [725]

A. Mr. Staples.

Q. Now, you say there was no improvement. Just state what the situation was, Mr. Waltie.

A. Well, the holes were still cut with vertical banks, and the elevations, sub-elevations, were still off.

Q. And how did that affect your structure form placing operations?

A. Well, it affected the whole routine of the job. The form panels were laid out at the respective holes that were supposedly complete, and send carpenters to these holes, and they'd start assembling, and then find that the holes were off, and they would have to dis-assemble what they had already completed, and take it out, and go hunt up fine graders again. In many cases that caused considerable delay, because with the carpenters at that particular hole, I suppose that they were able to go right ahead and would leave them alone necessary for the time required to complete their work, and if something happened right off the bat, why, then they naturally sat there until I got back.

Q. Did you develop any system when the—or how did you know when the carpenters were delayed in putting in a structure?

A. After a few times of them sitting and waiting for me, without me realizing it, yes; that is, we designed a signal system. [726]

Q. What was it?

(Testimony of Fred Waltie.)

A. We'd just stick a 2 by 4 up in the air, with a white handkerchief. Whenever I had opportunity I'd look for that. Whenever there was one up I knew they were in distress, and I'd go back and help them.

Q. And what did you do then with reference to getting fine grading done by Macri and Company, when you'd find an excavation that was not proper as you've described it?

A. Well, I'd have to go and hunt up Mr. Staples and find out where his men, or any of the men that he had available, were, so I could go and get them and take them back to the excavation and have them finish the work.

Q. I don't believe we touched on this point at all, Mr. Waltie; about how far would it be from one of these structures to where the next one might be? I don't think that's been touched.

A. Oh, it varied. At a road crossing it's just the width of a road, a county road, to a thousand feet, approximately a thousand feet.

Q. And the terrain out there was entirely level, or not?

A. No, it was fairly rough.

Q. Could you, standing at one station or excavation, at all times see the next one?

A. No.

Q. Could you always see this white flag up on the 2 by 4? [727]

A. Well, if I made an effort to get to a point to see it, why, I could, eventually.

(Testimony of Fred Waltie.)

Q. Well, then, when you had to get Mr. Macri's fine graders to come back, where would they have to come from?

A. Well, they might be over miles away.

Q. How far away?

A. Miles; actually across country there it isn't so far, but when you have to take the road around, which there were very few of, why, it meant quite a little distance at times.

Q. And in order to get from where the carpenters were with a hole not ready, what would you do to them, specifically with reference to getting to the other——

Mr. Holman: I object to counsel's question. He's concluding elements that are based on assumption.

The Court: Overruled. Did you get the question? A. No, I didn't.

The Court: Well, let's start over again, and we'll ask another one.

Mr. Holman: I object to counsel, I know he doesn't intend to, but he certainly ought not to ask leading questions, and his question was suggestive, I thought.

The Court: All right, go ahead.

Mr. Waltie, you've testified about the white flag being up, which indicated that the carpenters were in distress? A. Yes. [728]

Q. Now, when you got back to that hole, and assuming that you then were going to get Mr. Macri's fine graders, now, what I want to know is



(Testimony of Fred Waltie.)

how did you go after them, where did you find them; did you walk there, or drive there, and how long would it take?

A. Well, I had to drive, naturally; it would take too long to walk.

Q. Well, tell the Court about it. That's the only way the Judge is going to know, Mr. Waltie, what you had to do, is to have you tell him what you did. How far you had to go.

A. Well, in some cases I didn't know where the fine graders could be found, so I would have to go and find Mr. Staples, which might be the upper end of the project, the other end, to find out where to locate his men.

Q. And what were your carpenters doing all this time?

A. Well, in rare instances we would have actually completed a hole so they could move ahead and move on to the next one, and then go back following completion of that hole, later on, but in most cases they just had to sit and wait.

Q. Well, when you got hold of Mr. Staples, then, if he was some other place on the project, what would take place then with reference to getting in touch with Macri and Company's fine graders, or his hand excavators? [729]

A. I don't quite understand that.

Q. Well, you've left the excavation, Mr. Waltie, where the white flag is. Now you said you had to go and find Mr. Staples, Macri's superintendent?

A. That's right.

(Testimony of Fred Waltie.)

Q. Now, I'm asking you, then, what did you do, if anything, with reference to getting in touch with the men who actually had to come back and do the digging, or did you quit when you notified Mr. Staples?

A. No, I'd have to go and get the men, wherever they were, in most cases.

Q. And then what did you do?

A. I'd take them back to the site, the particular excavation.

Q. Now, would you advise Mr. Staples, Mr. Macri's superintendent, of this situation?

Mr. Holman: Just a minute, your Honor, "this situation."

Q. With reference to the fine grading?

A. I beg pardon.

Q. Would you advise Mr. Staples, who was Macri's foreman, of the fine grading condition as you were finding it and as you prescribed?

A. Yes.

Q. And what would take place? What would he say, what would you say? [730]

A. Well, I'd ask him if we couldn't get it done faster, and he didn't have time to be on there with the fine graders, and he repeatedly asked me to take charge of them.

Mr. Holman: I move the answer be stricken. He asked what he said—I'll withdraw that.

Q. And what did you say, Mr. Waltie?

A. I told him I didn't have the time either.



(Testimony of Fred Waltie.)

Q. Now, did that same general situation exist throughout the time you were on the project as Schaefer's superintendent? A. Yes.

Q. Now, Mr. Waltie, do you recall about April 29 Mr. Schaefer being on the project with Mr. Macri and I believe Mr. Bill Schaefer and Mr. Staples, at which time a conversation took place with reference to Mr. Macri's method and condition of the excavating work? A. Yes.

Q. Would you just relate in your own words what took place at that time, that is, what was said, approximately where you were, and just follow it through? A. Well, at the time that——

Mr. Holman: First, when was that?

The Court: Do you want to fix the time?

Mr. Olson: I asked him on April 29, 1944; I started out my question with that.

The Court: Oh, I see; I didn't get that either.

Mr. Olson: I'm referring to April 29, 1944.

A. Well, at that time I was working on structure number 18, and Mr.—well, I was doing some hand excavating myself there, that is, with Mr. Schuler, who was a carpenter. Mr. Schaefer drove up and told me not to do any more hand excavating whatsoever.

Q. Was Mr. Macri there?

A. Yes, and there was nothing else to do in the field, there were no other holes ready, so I sent Mr. Schuler in——

Q. Who was Mr. Schuler?

A. He was a carpenter that worked on the Concrete Construction Company crew, and Mr. Schae-

(Testimony of Fred Waltie.)

fer asked me to go with them and check over some of the excavations, and explain why they were so difficult to put forms in, so we checked back over numerous structures; I've forgotten how many.

Q. Speak a little louder.

A. We checked back on numerous of the structure holes, and went over those that we had already placed, and showed Mr. Macri where they were impossible to work in.

Q. And just explain what you showed him.

A. Well, that the banks were cut vertical, that you couldn't, you didn't have room to hardly get your form in, let alone to get in there and work with it too, and that it was only natural that there would be dirt kicked down on the forms, and it would be impossible to strip them as they were [732] after the concrete had been poured.

Q. Go ahead with this meeting between Mr. Macri and Mr. Schaefer and the others. Tell what was said and where you went and what you did.

A. Well, we checked those holes, and Mr. Schaefer told Mr. Macri that he wasn't going to do any of the fine grading, and that the job was costing him far too much money to go ahead with it, and Mr. Macri told Mr. Schaefer not to worry about the cost, that he'd pay for all the extra cost and excess labor we'd been put to. Mr. Schaefer I believe made the remark that it wasn't only the time of excavation, it was the time lost in being held up so much.

all no better

(Testimony of Fred Waltie.)

Q. What did Mr. Macri say, if anything?

A. Well, he said he'd take care of all the costs that we were put to.

Mr. Hawkins: Excuse me. This witness is going to testify as to an oral agreement, I take it, between the defendant Macri and the plaintiff Schaefer, and I object to the introduction of oral testimony varying the written contract. Now, the testimony so far shows that the fine grading, except, I think, very few minor instances, was actually done by Macri and Company, the testimony of Mr. Darcy, and in the second place, we have a written contract here; they're attempting to vary it by an oral agreement, an agreement which must be in writing [733] to be binding upon the parties. Now, it is true that there may be part performance, but my answer to that contention is that the performance which Concrete Construction Company actually did is just as consistent with the written contract itself as with any subsequent oral agreement, and therefore it cannot be relied on as part performance to take this oral agreement outside the statute of frauds.

Mr. Holman: I join in that, and that position that's been taken throughout.

The Court: It will be overruled.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you recall where you were in your relating of the conversation, Mr. Waltie?

(Testimony of Fred Waltie.)

A. We were out on the field at the very first part, somewhere along the first part of lateral 59.3.

Q. What I referred to, do you remember how far along in the course of the conversation you were when counsel made his objection? You had just said, I think, Mr. Waltie——

Mr. Holman: I object.

Mr. Olson: All right, Mr. Reporter, will you read the witness' answer?

(Whereupon, the reporter read the last previous answer, as follows: "Well, he said he'd take care of all the costs that we were put to.") [734]

Mr. Olson: Is that enough to orient yourself?

A. Yes, and then he said also that he would see that the job went ahead so that there would be no more waiting or no more digging by our men, that we could go right in and get things done the way it should be.

Q. Is that in substance the extent of the conversation, or was there more of it?

A. Well, I made some notes at that time, and if I may refer to those, I may be able to add to that.

Q. You may refresh your recollection.

The Court: You may refer to the notes to refresh your memory.

Q. Not to read them out loud, you understand, Mr. Waltie, but simply to refresh your recollection, if they are notes you made.

(Testimony of Fred Waltie.)

Mr. Hawkins: Are these notes you made at the time?

A. They were made very shortly after the meeting. It wasn't right at the meeting.

Mr. Holman: Made voluntarily, or under direction, Mr. Waltie? Did somebody direct you to make them, or not?           A. No.

Mr. Olson: That's immaterial, if the Court please.

The Court: Well, he's answered it.

A. Well, Mr. Schaefer at that time told Mr. Macri that they'd have to be right and kept right, or that he was going to [735] pull off of the job, and so Mr. Macri told Mr. Staples then to go on with the work and to see that things were done properly, and for Mr. Schaefer to keep his crew there and keep them working.

The Court: It's time for mid-afternoon recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Waltie, directing your attention to the second conversation or meeting between Mr. Macri and Mr. Schaefer out on the field at 1062 on June 15, 1944, testified to by Mr. Schaefer, is



(Testimony of Fred Waltie.)

that sufficient to direct your attention to the meeting that I'm referring to?      A. Yes.

Q. Were you present at that meeting?

A. Yes.

Q. And do you recall who else was there besides yourself, Mr. Macri, and Mr. Schaefer?

A. Mr. Al Hunter, and Mr. Cohen.

Q. Now, would you state the substance of the conversation that took place in Mr. Macri's presence and with Mr. Macri on that date?

A. Well, we again checked the structures——

Q. And also state what you did leading up to the conversation. [736]

A. Well, we checked the structure excavations for the benefit of Mr. Cohen, who was Macri's engineer, and to prove that they were excavated to—well, rather, just to prove that they were not right, and then I can't remember who said which first.

Q. Just give the substance of the conversation as best you can recall.

A. Well, Mr. Schaefer was insisting that he didn't want to go on with the job as it was being done then, that the costs were absolutely in excess of what they should have been, and the costs were very high then, and we hadn't got anything done, and he wanted to have the situation changed before we would come back on the job, and Mr. Macri said that he didn't have to worry about the extra cost, that he'd taken care of that, and that he would have an engineer on the job Monday who would see that things were done properly.

(Testimony of Fred Waltie.)

Q. Do you recall any conversation about the fine grading?

A. Well, Mr. Macri made the statement that two or three-tenths was nothing to be concerned about, that it didn't amount to anything, and Mr. Schaefer said that anything other than an absolute fine grade brought to concrete line, either on elevation or side lines, neat lines, was absolutely Mr. Macri's responsibility, and that he wanted nothing to do with it, and Mr. Macri said that he'd like to have [737] Mr. Schaefer take over the hand excavation, and Mr. Schaefer then again said that he absolutely wanted nothing to do with it, that it was not his responsibility, and Mr. Macri would have to see that it was done properly.

Q. Well, now, this two or three-tenths that you speak of, can you amplify what that means, or what it is?

A. Well, in most cases that two or three-tenths would actually be a couple of yards of earth to be taken out of the structure hole.

Q. Well, what I'm getting at, this two or three-tenths, what does it mean?

A. Well, it means that Mr. Schaefer should have allowed variation for that much.

Q. How much is two or three-tenths? Two or three-tenths of what? A. Of a foot.

The Court: I thought you meant inch. What was the date of this, by the way? I don't think I got that.

(Testimony of Fred Waltie.)

Q. June 15. Was there any structures stripped while you were there? A. Yes.

Q. Forms removed out of the excavations?

A. Yes, there were, but I actually wasn't there when they were stripped.

Q. I see. What was the situation with reference to lateral [738] clearance between your outside form of your structure panel and the bank of the excavation?

A. Well, it was so close as to be almost impossible to get structures in without a lot of hand digging by the carpenters when they got there.

Q. Well, was there hand digging on the banks to get your structures in? A. Oh, yes.

Q. Can you amplify the nature of any of the digging you had to do with reference to lateral clearance in putting in your structure forms?

A. Well, yes; we had to widen it out; in some cases the elevations were wrong, that is, we had to either bring them back or excavate to lower them, and we were usually not laterally extended far enough.

Mr. Olson: You may examine.

#### Cross-Examination

By Mr. Holman:

Q. Mr. Waltie, you said you were with the Oregon State Highway Department? A. Yes, sir.

Q. In what capacity?

A. As a bridge construction man.

Q. Bridge construction engineer?

A. I didn't say engineer.

(Testimony of Fred Waltie.)

Q. Bridge construction—under Mr. Baldock?

A. Yes, indirectly.

Q. Are you a graduate engineer, Mr. Waltie?

A. No.

Q. Where is your residence?

A. Prineville, Oregon.

Q. Were you subpoenaed to come here?

A. No.

Q. Was arrangement made with the Oregon State Highway Department you could be absent for the purpose of attending?

A. Yes, but not to Mr. Baldock.

Q. Not to Mr. Baldock; it would be your superior?

A. Yes, sir.

Q. Who is that since Mr. McCullough's death?

Mr. Olson: If the Court please, I don't see the materiality of going into this.

Mr. Holman: Strike.

The Court: Sustained.

Q. You say you went on in April, 1944, on this job?

A. Yes, along there somewhere.

Q. Then if the entry on the Concrete Construction Company payroll shows you present for the week of March 23 to March 29, would that be incorrect?

A. No, it wouldn't have to be incorrect.

Q. Oh, were you giving only an approximate time, Mr. Waltie?

A. That's right. [740]

(Testimony of Fred Waltie.)

Q. Then it was a fact, was it not, that you stayed on for eight weeks and then you were absent for six weeks, about six weeks?

A. Yes.

Q. I'm referring from about the 18th of May to the 22nd of June, you were not on the job?

A. If the records show that, that would be the case.

Q. Would you like to check the payroll to find out?

A. No, because I wouldn't remember the dates anyway.

Q. I understood you to say that from the time you went on until the time you left this job, you were on it continuously. You may not have said that. Did you?      A. No, I didn't.

Q. All right, sir. Then there was at least one period in there of some time that you were not on the job?

A. I was actively in charge of the job, but we weren't there.

Q. Where were you during that period I spoke about?      A. In Portland.

Q. In Portland with whom?

A. With the construction company that I worked for.

Q. Yes; with this same company?      A. Yes.

Q. On some other job?

A. On some other work, yes.

Q. What other job? [741]

A. That I couldn't say, sir.

Q. Sir?      A. I couldn't say.



(Testimony of Fred Waltie.)

Q. You mean you can't say, or you don't remember? A. Well, I don't remember.

Q. I see; and that is correct, is it, Mr. Waltie, that until just a week before July 4 from mid-May you were off of this job?

A. If the records show that, that would be right.

Q. That's your best recollection, that you were?

A. Yes, there was a period that I was off.

Q. Now, when you came back in June, the latter end of June, were you replaced by Mr. Darcy?

A. No.

Q. Mr. Darcy came right after the 4th of July, didn't he?

A. I don't remember the exact date.

Q. I see; and were you rated as a carpenter foreman and drew a carpenter foreman's pay, Mr. Waltie? A. Well, no.

Q. You were not?

A. No; the reports show that I'm a carpenter foreman, but then I had a reason for using that, of my own.

Q. Well, I'm interested, in view of the payroll, which shows you as a carpenter foreman, does it not? A. Yes. [742]

Q. Well, why?

A. Well, it was my first job as a superintendent, and I just didn't feel qualified to call myself that at the time.

(Testimony of Fred Waltie.)

Q. Yes, sir; in other words, you didn't want to assume the title of superintendent? A. Yes.

Q. And that was your first job in connection with structure excavation? A. No.

Q. Sir?

A. Well, with that particular type of structure excavation, yes.

Q. Yes, I mean of this type of construction.

A. Yes.

Q. May I ask you, Mr. Waltie, if Exhibit 25, about which you testified on direct, is a fair sample of an average ordinary structure excavation on 1062, schedule 1? A. As an average, yes.

Q. In other words, it is your statement that most of the excavations on 1062-1 have the two or three depths as shown by that model?

A. You mean that that is the average of the structures?

Q. Yes, is this a fair representation of the average structure?

A. Yes; there are some larger and some smaller, if that's [743] what you mean.

Q. That is correct, sir, but isn't this in fact a road crossing structure?

A. Well, it is a delivery; two deliveries, in fact.

Q. Yes, sir, but this particular 25 is a road crossing structure? A. Not necessarily, no.

Q. Don't you know where 25 was made from?

A. No.

Q. You've never been told?

A. I've never been on that particular part of the site.

(Testimony of Fred Waltie.)

Q. You don't know that that is for a certain structure?      A. Pardon.

Q. You don't know that that is made as a replica of a certain structure?

A. Well, if it were made to scale it would have to be.

Q. Mr. Waltie, were you not present when that was identified and explained by Mr. Darcy?

A. Yes.

Q. Didn't you hear him explain what it was?

A. Yes, I think so.

Q. Now, isn't it a fact that before you took the stand you consulted with counsel and Mr. Darcy with respect to this structure, and understood that it represented a certain structure? [744]

A. Only as an example; not as a structure.

Q. Then it is your understanding that that is not any actual reproduction of an actual structure?

A. No, I didn't say that.

Q. Well, what is your understanding?

A. It's not an example of any structure that I worked on. What I mean is that this here has the floor elevations complete, in order for that structure to sit in there, and the assemblies I testified to, referred to, in the field, those floor elevations were not right according to the plan.

Mr. Holman: I move that be stricken as not a responsive answer, that latter portion.

Mr. Olson: I object, your Honor.

The Court: Let's read it over.

(Whereupon, the reporter read the last question and answer.)

(Testimony of Fred Waltie.)

Mr. Holman: That's the same part that I object to, your Honor, the last portion of the witness' testimony.

The Court: Well, I'll deny the motion. You asked for his understanding and explanation of it.

Q. Would you please step over to that 25, Mr. Waltie? Calling your attention to what is marked 25c and d—— A. These two, yes.

Q. ——will you tell me whether or not in excavations as [745] encountered by you when you went to put in the structure you found those at times excavated and covered with planks so that they would not be caved in? A. No.

Q. Never did? A. No.

Q. Now, would you tell me whether or not on any occasion the bank shown as 25g—what do you call this? A. Oh, it would be a fillet.

Q. Fillet, shown by 25g, connected with 25h, was ever broken down after it had been fine graded, broken down by your carpenters after it had been fine graded? A. No.

Q. Never? A. Never.

Q. Nor 25e nor g nor f?

A. There is a point that I'd have to make clear before I could answer the question properly.

Q. Well, make it clear, sir.

A. The fact that these had never been cut would allow for breakage; it should have been cut this way, which would exclude any chance of breaking it.

Q. Well, didn't you tell on your direct that 25g and 25f were never cut and you always had to do it? A. I would say never. [746]

(Testimony of Fred Waltie.)

Q. You would say that that was your testimony on direct? A. Yes.

Q. So that if they were cut wrong, it was your operation in cutting them wrong, wasn't it, so they would break?

Mr. Olson: I submit that hasn't been his testimony in any regard at all.

Q. Didn't you say that they were cut too sharp and they would break?

A. Well, they were cut too sharp, instead of being cut this way. This way they naturally won't break.

Q. Now, you say that there was no single occasion where the operations by the Concrete Construction Company broke or shoved down wall 25b?

A. Well, you understand that I wasn't actually on every structure hole from the time the carpenters started to work until it was completed. That would be impossible for me to swear that they were all that way.

Q. Well, I want you to be just as much on them as you were on direct examination, and answer my question, Mr. Waltie.

Mr. Olson: I submit the witness has answered, to the best of his ability.

The Court: I think the question is objectionable. He said he wasn't there all the time, and couldn't answer.

Q. Then how could you tell me those were never cut if you weren't there all the time? [747]



(Testimony of Fred Waltie.)

A. Because I inspected the holes before the carpenters got there.

Q. Yes, sir; and now, this wall represented by 25a and 25b is of variable depths with respect to the different structures, isn't it? A. Yes.

Q. Yes. It might be as much as a foot or so, instead of a considerable depth?

A. That's right.

Q. Do you know what this one is, as shown in the model? A. No.

Q. And there are all types of change of grade in those structures, aren't there? A. Yes.

Q. Yes. Many of the structures are considerably out of the ground upon completion, aren't they—above the ground? A. In some cases.

Q. I'm talking now about the completed structure, Mr. Waltie? A. Yes.

Q. Some of them would be partly in the ground and partly out? A. Yes.

Q. And some of them would be even with the ground, or below the ground?

A. That is, you're speaking of the top elevation?

Q. The completed structure. [748]

A. Well, I mean the top elevation?

Q. Yes, right. A. Right.

Q. Now, if you'll step back over there. I believe you said on direct examination with reference to structure exhibit 25 that where the bank indicated as 25a and b was broken down, it was necessary to crib?

(Testimony of Fred Waltie.)

A. I didn't say broken down. I said either cut too far or not far enough.

Q. O.K. I thought you said broken down.

A. No.

Q. Anyway, where it was not flush with the neat line of the structure? A. That's right.

Q. Now, then, if a crib were put in, would that be a carpenter operation, or would the frame of the structure be used as the crib?

A. There is absolutely no rule that covers putting that in.

Q. In practice, in your practice, Mr. Waltie, was the frame of the structure the crib? Do you understand what I mean? A. Yes.

Q. Well, was that so, or not?

A. That was used as a face for the concrete; is that what you said?

Q. No. Would that be used as the crib? [749]

A. Well, you asked me if I put in a crib, that would be used as a crib?

Q. Yes, sir. A. Well, that is obvious.

Q. It would be the frame of the structure itself, and then behind that you said that you put earth?

A. Yes.

Q. And that was supposed to be compacted, but you didn't compact it?

A. No, because the Macri men were supposed to do that.

Q. Sir? A. The Macri men did that.

Q. The Macri men did that, so it was compacted to your knowledge, was it not?

(Testimony of Fred Waltie.)

Mr. Olson: I'm getting confused myself.

The Court: I may be confused here, but I thought he was testifying about these cribs with reference to one of these vertical walls that was out of line. If it weren't out of line there wouldn't be any frame of the structure at all, there wouldn't be any form; the concrete would be poured against the line.

Mr. Holman: That's right; now I've asked him when he puts the crib in if it isn't the wall of the structure, the frame, the outside frame.

The Court: There is no frame there. [750]

Mr. Holman: He said he has to put a frame in to crib it. I'm asking if the frame of the structure doesn't form the crib. Is that right, or not?

Witness: No, it is not.

The Court: You asked him if the frame weren't used as the crib, isn't that what you asked?

Mr. Holman: Yes.

The Court: Well, that's confusing, and there wouldn't be any frame.

Mr. Holman: I think the confusion is this; the witness has said where this 25b is off, he has to put a crib in.

The Court: That's right.

Mr. Holman: And then throw dirt behind there. What I asked is when he put a crib in, if that didn't become the frame of the structure. He said it did.

The Court: I didn't understand you to say that.

Mr. Holman: He did.

Witness: Well, I didn't answer to that.

(Testimony of Fred Waltie.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. What I would like to know is, where you put a crib in, do you pour with concrete up against the crib?

A. Well, in the first place the crib is illegal.

Mr. Holman: Well, I move that be stricken, your Honor. [751]

The Court: That will be stricken. That isn't responsive.

Mr. Holman: Will you read the question, Mr. Reporter?

(Whereupon, the reporter read the last previous question.)

A. Well, we did, yes.

Q. That's what I want to know. Then instead of the earth, there would be a board structure there, right?

A. Yes.

Q. All right, now we're getting where I want. Then was that lined with veneer?

A. No.

Q. It would be just the shiplap boards without the veneer; that was done under your direction?

A. Yes.

Q. Was that called to the attention of the engineer, the government engineer?

A. Yes.

Q. What do you mean, then, by saying it was illegal?

A. Well, it took—well, an act of kindness of the engineer to allow it to be poured that way.

(Testimony of Fred Waltie.)

Q. I'm referring you to Macri's Exhibit 13a of the date of April 14, 1944. Now, you were on the job then, were you not? [752] A. Yes.

Q. I mean April 18, Macri's 13b, April 18, 1944; and under the remarks you say this: "Const. installing forms at lateral 59.3." A. Yes.

Q. That is in April, April 18. Is that correct, to the best of your memory?

A. Yes, it would be the best I remember. I don't actually know.

Q. Yes, sir. Can you tell me how many forms were installed in April? A. No.

Mr. Holman: Your Honor, I would like at this time to request that 13a, b and c be substituted for the engineer's copies, or maybe I had better hold it for all of them, your Honor.

The Court: Well, what is the necessity for taking them out at this stage of the trial?

Mr. Holman: None, except I understood your Honor's instruction was that we would have copies made and substituted.

The Court: Yes, that may be substituted, if counsel has no objection.

Mr. Olson: We have no objection. I think the original form should stay here. [753]

The Court: That's what I had in mind, unless there is some reason for taking it out. I think it would be better to make the substitution at the end of the trial.

Mr. Holman: Very well.



(Testimony of Fred Waltie.)

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Now, does April 18, as to the time that the forms were being set there, as called to your attention by Macri's 13b, refresh your recollection as to whether or not forms were on the ground when you came? A. Do you mean that the——

Q. Forms were in the excavations, yes, sir.

A. When I came where?

Q. Came on to the job, sir.

A. No, they were not in excavations when I came on to the job.

Q. And would you say that April 18 was the first time that any forms were set by the Concrete Construction Company?

A. If the reports that I made show that, yes.

Mr. Olson: I think he said, counsel, that he finished the first one on the 18th, and started the 15th.

Q. I am directing your attention particularly to your direct testimony that the forms were reported to you as ready to be set—pardon me—the excavation was ready to receive the form on April 15.

A. That's what the record shows, yes.

Q. Now, then, does it mean that before April 15 there were no forms set? A. Yes.

Q. Then had there been forms built in the yard at that time, Mr. Waltie? A. Yes.

(Testimony of Fred Waltie.)

Q. How many, about?

A. Well, I don't recall the exact amount. I remember our goal was 75 or 80, and we were unable to complete the ones that we had planned.

Q. I was asking about forms in the yard; I wasn't asking about holes at all.

A. I was referring to the forms in the yard. They are made completely in the yard.

Q. They are made in panels, are they not, and then assembled?      A. Yes.

Q. So when you spoke of your carpenters building forms in the field, you meant assembling the panels?      A. That's right.

Q. They built no forms in the field?

A. No, they're just assembled.

Q. Can you tell me what structures were set, were accommodated by forms on April 17, by you?

A. 1, 2, and 3. [755]

Q. Forms 1, 2 and 3. Now, would that be numbering forward on the stationing? Were you going forward on the stationing, or backward on the stationing?

A. It would be the beginning, yes.

Q. It would be forward on the stations, sir?

A. Yes.

Q. There wasn't any concrete poured until August, was there, Mr. Waltie?      A. No.

Q. Now, isn't it a fact that when the actual operation of concrete pouring commenced you were replaced as superintendent?      A. Yes.

Q. By Mr. Darcy?      A. Yes.

(Testimony of Fred Waltie.)

Q. Or by Mr. William Schaefer, which?

A. Mr. William Schaefer was up there because I had asked for relief, and he was supervising the replacing of someone in my place.

Mr. Olson: You had asked for what?

Q. Relief; in other words, you mean you wanted to leave the job? A. Yes, sir.

Q. You wanted to leave the job, did you not, because you felt that you were not qualified as a concrete man? [756] A. No.

Q. Or didn't you? A. No, sir.

Q. I see; it was some personal reason, then, was it, Mr. Waltie? A. Yes.

Q. How much concrete had been poured before you left the job? A. That I couldn't say.

Q. I mean with respect to structures?

A. I wouldn't know.

Q. Have you a record?

A. There is a record, yes.

Q. Can you consult a record? A. Yes.

Q. Will it require computation, Mr. Waltie?

A. Yes, it would.

Q. Well, then, I'll pass the question.

A. O.K., thank you.

The Court: I don't know that I understand, here. Was this question how much concrete had been poured before he left?

Mr. Holman: Yes, your Honor.

The Court: I thought he said he left when the concrete pouring started.

(Testimony of Fred Waltie.)

Mr. Holman: No, he left on August 12, and there [757] had been concrete poured before he left. I wanted to get the concrete poured.

The Court: I'm not trying to comment on the evidence. I just wanted to get it straight. I thought he said he was relieved from the job as soon as the concrete pouring started, but there must have been some poured before that.

Witness: I think that was the 1st; I was relieved of the concrete pouring before it started, actually.

The Court: Well, how could there have been some poured before he left?

A. I was there after the relief man took over.

Q. After you had severed your connections with the Concrete Construction Company?

A. Well, they were severed completely, I think it was on the 10th of August.

Q. Mr. Waltie, regardless of the question of whose function it was, as an economic proposition in field operation would it have been less expensive for you and any of your carpenters or helpers you had to take the shovel and the mattock and fine grade a structure, than for you to go after Mr. Staples and his crew and bring them back?

Mr. Olson: Now, if the Court please, I object to that question as not being proper cross-examination. In the first place, I didn't ask him on expense, but certainly, [758] your Honor, it is an improper question, because there was no obligation upon the Concrete Construction Company to do ex-

(Testimony of Fred Waltie.)

cavation. And it turned out, it may have been cheaper if we had done this whole work ourselves, rather than to insist that Mr. Macri do his part of the contract.

The Court: Well, I'll sustain the objection. I think it is immaterial what was the most economical method.

Q. Would it not have been practicable, Mr. Waltie, for you to have done the fine grading on the structure and kept an account, and made a claim against Macri under the sub-contract?

Mr. Olson: That's objected to as being immaterial——

Mr. Holman: I have in mind the position under the sub-contract.

Mr. Olson: ——and further, that there was no obligation upon the Concrete Construction Company to do fine grading.

The Court: I'll sustain the objection.

Q. Would you please tell me who was present at the meeting you say occurred on April 29, 1944, when Mr. Macri was there?

A. Mr. Macri and Mr. Staples, Mr. M. C. Schaefer, Mr. W. E. Schaefer, and myself.

Q. And you say you were working at that time on structure 18? [759]      A. Yes.

Q. What were you doing? What was your operation on structure 18?

A. May I withdraw that?

Q. Yes, sir.

A. I'm not too sure that I was on 18; maybe I did, maybe I didn't.



(Testimony of Fred Waltie.)

Q. You told counsel it was structure 18?

A. Yes, I perhaps did.

Q. You're not sure now, sir?                      A. No.

Q. Very well, sir. Now, on that occasion, you said in your direct testimony, "We checked back on numerous structure holes." Who is "we"? Who did the actual checking, I mean the measuring and checking?                      A. Mr. Staples and myself.

Q. Mr. Staples and you.

The Court: You'll have to hurry this up a little, Mr. Holman. You're taking too much time entirely.

Mr. Holman: That's all, your Honor.

The Court: Any questions?

#### Cross-Examination

By Mr. Hawkins:

Q. Did you install any structures such as is evidenced by exhibit 25 and 26?

A. Well, yes, as close as they come to that. They're all the [760] same type, and yet they have variations.

Q. I see, and in each of those instances you had a neat concrete wall up against bare dirt?

A. On that particular type structure, yes.

Q. Then the character of the dirt out there is such that you can use the dirt as one wall, is that right?                      A. If it is not too high.

Q. If it is not too high. What is the average depth of these excavations?

A. I don't remember that.

(Testimony of Fred Waltie.)

Q. Around six feet?

A. You were speaking of that cut, now, or the actual depth of the hole?

Q. The depth of the hole, measured with reference to the surrounding terrain.

A. It would be hard for me to say the average, because that was only a small portion of the job.

Q. Well, it would vary from three to six feet?

A. Presumably.

Q. I beg pardon?

A. I really don't know.

Q. Well, how many excavations were you in, in this area?      A. Up to about 75.

Q. About 75?

A. That doesn't mean 75 holes, though. [761]

Q. Well, how many holes were you in, then?

A. That I couldn't actually say.

Q. Approximately 50?

A. Could be that.

Q. And you cannot say on the average how deep they were?

A. Well, if you wish an actual average I can't, no.

Q. Well, just your best estimate.

A. Oh, I'd say four feet.

Q. About four feet; and in each one of these holes the excavation was at least one foot from the neat line of the concrete wall, from the outside?

A. You asked if it was?

Q. Yes.      A. No.

Q. It was not; it was less than that?

A. Yes.

(Testimony of Fred Waltie.)

Q. Did you do any of the rough excavating?

A. Partially, or directing it.

Q. You or any of your crew? A. Yes.

Q. Of the rough excavating? A. Yes.

Q. And what instruments did you use for that purpose? A. Picks and shovels.

Q. Picks and shovels. In addition, you did fine grading, is [762] that right? A. Yes.

Q. Now, with reference to this meeting that took place on the 29th of April, 1944, at which you were present, do I understand your direct testimony correctly that Mr. Macri agreed to pay the Concrete Construction Company, that is, Mr. Schaefer, for the fine grading that you were to do in the future?

A. That was the way he said it, yes.

Q. I see, and do I understand you correctly that Mr. Schaefer said that he would not take over the fine grading? A. Yes.

Q. Do I understand you correctly that Mr. Macri agreed to do all of the work in connection with the fine grading? A. Yes.

Q. Then in other words, Mr. Macri not only was to do all of the work on the fine grading, but was to pay the Concrete Construction Company for doing the same thing?

A. Well, the result of the meeting was established that we were to do none of the fine grading, and that he was to do it all.

Q. Oh, I see; in other words, then, the situation remained as it was before; Macri was to do the

(Testimony of Fred Waltie.)

excavating, and you folks were to prepare the structures and install them in the excavations? [763]

A. Yes.

Q. And pour the concrete?

A. That's right.

Mr. Hawkins: I think that's all.

Mr. Holman: May I ask the witness another question, your Honor?

The Court: Yes, all right.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you make up any statement of cost for any of the fine grading or the excavation that you did?

A. I made a time report, but not a cost report.

Q. Yes, sir, so you never, as superintendent, detailed to Mr. Macri's superintendent any bill for anything you did?

A. Not a bill, no.

Q. All right, sir, and that was never done to your knowledge?

A. I detailed hours, but not the actual cost.

Q. You detailed the hours to whom?

A. Mr. Staples.

Q. You detailed the hours to Staples, expended by your men?

A. Yes, I detailed them to him to have him sign them so I could send them to our office. I never could get him to sign them, though.

(Testimony of Fred Waltie.)

Q. In other words, you wanted his signature on them so you could send them to your office?

A. So that they could be presented. [764]

Q. Did you give Staples anything to send to Macri's office?

A. No, that would have been automatic, but he wouldn't sign them.

Q. Did you give Staples anything to send to Macri's office?

A. No, not without we had the same copy.

#### Cross-Examination

By Mr. Ivy:

Q. Mr. Waltie, those statements that you tendered Mr. Staples for signature, did they set out the work that you and your crew had been doing for Mr. Macri?

A. That is, the excavation work, yes, the extra time taken on each structure.

Mr. Ivy: That's all.

#### Redirect Examination

By Mr. Olson:

Q. Mr. Waltie, counsel referred to the payroll as showing you having been off the job for five weeks. Would you explain that, what took place, and why?

A. Well, Mr. Schaefer, after they had so many meetings and consultations, and work still didn't go on, why, Mr. Schaefer told me to take the men off the job until things were straightened out.



(Testimony of Fred Waltie.)

Q. And do you know when you took the men off the job? A. Not the exact date, no.

Q. Were there any holes excavated and fine graded in accordance with the specifications and ready to receive concrete structure forms? [765]

A. No.

Q. When you pulled them off the job?

Mr. Holman: Just a minute. I object to that question, your Honor. He can ask the witness if they were fine graded, but he can't put in the witness' judgment the matter of plans and specifications.

The Court: I'll overrule the objection. He was working with the plans and specifications.

Q. Would you answer the question, Mr. Waltie?

A. Yes. I've forgotten what the question was, now. I have it now, if there were any holes ready for forms?

Q. That's the substance of it.

A. And I said no.

Q. Now, before taking this job as superintendent, Mr. Waltie, had you had previous experience in concrete construction work? A. Yes.

Q. And would you relate what previous experience you had?

A. Well, I worked for the Concrete Construction Company previous to that time, about three years, and had been in construction work for years before that; in fact, since I got out of school.

Q. And how long had you been in construction work before going on this job?

A. Oh, at least 12 or 15 years. [766]

(Testimony of Fred Waltie.)

Q. And did that work deal with concrete construction?      A. Not entirely, no.

Q. Did it partly deal with concrete construction?

A. Yes, at times.

The Court: Is that all?

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: No, your Honor.

The Court: Do you have any further?

### Recross-Examination

By Mr. Hawkins:

Q. Mr. Waltie, in all of your experience in construction work have you ever seen an excavation such as evidenced by exhibit 23? That is the ideal excavation over there.

Mr. Olson: I think that is objectionable, your Honor, as being immaterial, if he's ever seen one.

The Court: Well, I'll overrule the objection. I think I see what is intended. Go ahead.

A. No.

Mr. Hawkins: That's all.

The Court: Anybody else have any questions? It is understood, then, that this witness may be excused from further attendance on the Court.

(Whereupon, there being no further questions, the witness was excused.) [767]

(Whereupon, the Court took a recess in this cause until Monday, March 3, 1947, at 10 o'clock a.m.)

Yakima, Washington, Monday, March 3, 1947  
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

THEODORE GALLOWA

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Theodore Gallowa.

Q. You live where? A. Portland, Oregon.

Q. By whom are you now employed?

A. Alford's Automotive.

Q. Do you at the present time have any connection with the Concrete Construction Company?

A. I do not.

Q. During 1944 were you employed by the Concrete Construction Company in connection with Roza Project 1062? [768]

A. I was.

Q. And in what capacity?

A. Mixer operator.

Q. That's concrete mixer operator?

A. Yes, sir.

Q. Approximately what time did you commence work on that project? A. July 31.

Q. And do you know how long you were on the project? A. Yes, sir.

Q. Until when?

A. November, I believe the 21st.

(Testimony of Theodore Gallowa.)

Q. Those dates both are in 1944?

A. Yes, sir.

Q. Now, were you on the first concrete pour, then?           A. I was.

Q. Did you have an opportunity, Mr. Gallowa, and did you examine or notice the excavations that were made in connection with 1062?

A. Yes, I did.

Q. Did you see the excavations before or after there were panels or forms placed in them?

A. Both.

Q. And would you just explain in a general way thoses excavations? [769]

A. Before the panels, or before the structures were in, the walls were vertical, and at one time I had the opportunity of noticing the carpenters doing excavating in the hole that they were going to put a structure in. What the excavation was I do not know, but they were in there with shovels and digging, and we were pouring a structure right close to them, and I noticed there that the walls were also vertical. There was not much space between the wall and the strong-backs, I should judge consisting of—well, right up against the wall at the bottom to maybe 8 or 10 inch clearance at the top.

Q. Now, approximately how much distance would there be between those various stations or structures, Mr. Gallowa?

A. Well, I should judge, pouring road crossings would be right across the road, consisting maybe of forty or sixty feet, to a quarter of a mile, up to half a mile.

(Testimony of Theodore Gallowa.)

Q. Now, when you came to a structure to pour it, ordinarily would the carpenters still be working there, or would they be away?

A. Very seldom that we poured or were ready to pour a structure that the carpenters were working in. We would always see to it that we were busy doing something else besides pouring structures if we were caught up.

Q. Now, during this period of time from July to November were you helping to pour each structure? [770]

A. Yes.

Q. In other words, your concrete crew worked as an entity on a structure until it was done, and went to the next one?

A. That's right.

Q. So that you had an opportunity to observe each of these structures during that time?

A. I did.

Q. Well, now, you have explained, then, some of the structures with reference to lateral clearance, Mr. Gallowa. State whether or not that was a general, typical situation with reference to each structure?

A. It was.

Q. Did you see any of the excavations where the bank had been cut into in order to accommodate the strong-backs on the panels?

A. I sure did.

Q. What was the situation with reference to whether or not your concrete crew was able to pour and work continuously?

A. We were not able to pour continuously at any time.



(Testimony of Theodore Gallowa.)

Q. And why not, Mr. Gallowa?

A. There were no structures ready.

Q. Would you say, then, that your concrete crew was working to capacity, or not?

A. How was that? [771]

Q. Was your concrete pouring crew working to capacity on the job? A. No.

Q. Were you ever sent to do other types of work? A. Yes.

Q. And explain about that to the Court.

A. Well, when we were caught up with the pouring of structures we would then, the foreman and I, my foreman and I, we would then start taking care of the equipment, and when we were caught up with that there was twice that we built bridges, just to have something to do, to keep our men, some of our men, occupied. When we were caught up with that, why, we went out and checked up with Mr. Darcy, and he himself told us that there wouldn't be any pouring for quite some time because of being caught up with the carpenters, and we would be sent back to Portland for work in there.

Q. So that at times you were sent from this job back to Portland? A. Yes.

Q. Now, what was the situation, if you know, Mr. Gallowa, as to whether or not the carpenters, on the occasions that you would have an opportunity to see them, were up with or were not up with Mr. Macri's excavators, fine graders? [772]

A. Yes, they were many a time caught up with Macri's excavation.

(Testimony of Theodore Gallowa.)

Q. Did you ever help remove any of the forms, or did you see it done?      A. No.

Q. Did you see any of them removed?

A. Yes.

Q. Can you explain what you saw or observed in the matter of removing form panels?

A. Well, in the matter of removing the panels, they had to do quite a bit of prying with two by fours and bars, and digging, to get the forms out.

Q. You say they done digging?

A. Oh, yes, they had to do digging to get the forms out.

Q. Did you see that, Mr. Gallowa?

A. Yes, and I noticed that one structure especially, that the panels were pretty well torn up by getting them out away from the structure.

Q. Now, would that be just an occasional situation, or general, or typical?

A. General; that was a general situation.

Q. Now, there's been some observation made about whether or not Mr. Schaefer had what is called a transit mixer on this project.

Mr. Holman: I object to the form of the question, [773] your Honor. I think it is leading.

Mr. Olson: It isn't a question so far.

The Court: Well, you may ask him about the equipment. I think you object to his assuming what was testified?

Mr. Holman: Yes, what's been testified here.

The Court: I'll sustain the objection to the form of the question.

(Testimony of Theodore Gallowa.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Did Mr. Schaefer have on the job what is commonly called a transit mixer? A. No.

Q. And have you worked in the concrete business for some time, Mr. Gallowa? A. I have.

Q. Are you familiar with concrete pouring operations? A. Yes, sir.

Q. Have you worked with these transit mixers?

A. I haven't worked with—I have worked at jobs with them, but never did operate one.

Q. Never did operate it; can you tell us whether or not on the terrain out there it would have been possible to have operated a transit mixer?

A. Not as satisfactory as our operation was.

Q. Why? [774]

A. They are too heavy, much heavier loaded than our mixer was, the way we transferred it.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Gallowa, you were not, then, concrete foreman? A. No, sir.

Q. What was your designation?

A. Concrete mixer operator.

Q. Concrete mixer operator; in other words, you would be shown on the payroll as an operator?

A. I believe so.

(Testimony of Theodore Gallowa.)

Q. How long had you worked for Mr. Schaefer before you came to this job 1062?

A. One year.

Q. And what had you been doing?

A. Well, helped with the work down at Portland, consisting of concrete pouring, operating the mixer down there.

Q. Same mixer? A. No.

Q. Same type?

A. Yes, and building forms.

Q. Then in your union affiliations were you affiliated as a carpenter or as a trucker or concrete pourer, or what?

Mr. Olson: Objected to as being wholly immaterial, if the Court please. [775]

The Court: Sustained.

Q. You were, then, subject to direction as to where you might work at any time, from Mr. Schaefer, whether at Portland, or here, or elsewhere?

A. By Mr. Darcy.

Q. By Darcy? A. Yes, sir.

Q. Was Darcy in charge of the Portland operations, too? A. No.

Q. Well, were you working under Mr. Darcy in Portland?

A. Oh, no, not in Portland; I'm sorry.

Q. Yes, sir.

A. No, I was under a different foreman down there.

Q. Yes, and subject to the direction of Mr. M. C. Schaefer, Matt Schaefer, or Will Schaefer, weren't you? A. That's right.

(Testimony of Theodore Gallowa.)

Q. And when you were told to come to 1062, this job, you hadn't been there previously at all?

A. At 1062?

Q. Yes. A. No.

Q. Had you been told that a number of forms had been in the ground for a long time, and been weathered or cracked? A. No, sir.

Q. You poured the concrete that was poured at all? [776] A. I did.

Q. And that was as late as July 31, 1944?

A. That's right.

Q. Could you tell by looking at the forms whether or not there had been some of them which had been in there for a long while?

A. I didn't pay any attention to that.

Q. You didn't pay any attention to the forms that you poured concrete in, sir?

A. Not as to how long they had been in, no.

Q. Not as to tightness? A. Oh, yes.

Q. As to cracks? A. Yes.

Q. As to warping? A. No.

Q. You didn't pay any attention to that at all, sir; and the excavations which you were telling counsel about, then, were excavations which had been made but had not yet been filled with forms, is that correct?

A. I can't understand that, sir.

Q. What is it you can't understand, Mr. Gallowa? A. I don't understand the question.

Mr. Holman: Will you read the question?



(Testimony of Theodore Gallowa.)

(Whereupon, the reporter read the last previous [777] question, as follows: "Q. You didn't pay any attention to that at all, sir; and the excavations which you were telling counsel about, then, were excavations which had been made but had not yet been filled with forms, is that correct?")

A. Yes.

Q. They were excavations which were being currently made while you were there?

A. Some of them.

Q. Most of them?                      A. Yes.

Q. Yes, sir; and most of those which had been made before you were there were filled with forms, were they not?                      A. That I couldn't say.

Q. What is your best recollection on that, sir?

A. I didn't have the opportunity to go around so much as some of them had. I was with the equipment, and the only work that I saw was if it was close to the mixer, or the operation.

Q. Well, Mr. Gallowa, if you began pouring concrete into the forms and continued until November 21, 1944, you certainly poured most of the concrete in the forms that were built, didn't you?

A. Yes.

Q. They had already been built some time before your pouring, [778] hadn't they?

A. Some of them.

Q. Now, is it one of those forms that you saw this particular place you told counsel, where it was

(Testimony of Theodore Gallowa.)

absolutely tight at the bottom and 10 inches out at the top?      A. Most of them.

Q. Most of them; can you give me any one section? Did you make any note?      A. No.

Q. Who was your concrete foreman?

A. Mr. Jack Holmes.

Q. Jack who?      A. Holmes.

Q. Did you report it to him?

A. He was right there.

Q. I asked you, sir, if you reported it to him?

A. We talked about it, amongst ourselves.

Q. Did you report to Mr. Holmes what you saw there?      A. Yes.

Q. All right, sir, and did he and you discuss the structure number, then, which one it was?

A. No.

Q. Now, is it or is it not a fact that in pouring concrete into forms there is some of what they call slop-over or spill-over concrete? [779]

A. Yes.

Q. And is it or is it not a fact that that gets in between the outer panel of the form and the dirt at times, and sort of cements it in?

A. We paid very close attention that that didn't happen.

Q. Well, does that happen, sometimes?

A. Very seldom.

Q. But when it does happen, then it requires prying, doesn't it?

A. We took care of that; the concrete crew took care of that.

(Testimony of Theodore Gallowa.)

Q. Yes, sir; it requires prying, does it not?

A. We didn't have to disturb the forms at all. We took it out while it was still fresh.

Q. But if it does set, then it requires prying, does it not? A. Naturally.

Q. Now, you spoke of the strong-back being up against the bank. Did you know whether or not the structure excavation was required to be one foot from the neat line, and not one foot from the strong-back? Did you know that, sir? A. No.

Q. Were you told anything about the requirements of the specifications with respect to excavation, Mr. Gallowa? A. No, sir.

Q. Were you told, for instance, that there had been any [780] usual practice in these excavations similar to other excavations in that area?

A. No, sir.

Q. Had you poured in other reclamation areas before this? A. How was that, sir?

Q. I'm speaking of concrete; had you poured concrete in other reclamation areas before coming to this 1062? A. No, sir.

Q. Then this was your first experience in pouring in a reclamation area? A. No.

Q. Well, where else had you poured, sir?

A. Denver, Colorado.

Q. In a reclamation area?

A. Yes, sir, government.

Q. Same type of structures? A. No, sir.

Q. What type of structures were those?

A. Building an ammunition factory for the government.

(Testimony of Theodore Galloway.)

Q. Oh, yes; well, then, that was building pouring?  
A. That's right.

Q. And was your experience building pouring, principally?  
A. I didn't get that.

Q. Was your experience in concrete pouring principally in pouring buildings? [781]

A. Not necessarily; foundations.

Q. Well, that's for buildings, isn't it?

A. Yes.

Q. Now, was it or was it not—was it principally in construction of buildings, in pouring?

A. Yes.

Q. The handling of the concrete as pertains to conformity to the grades, alignment, proper placement of forms, and the like, was not your function, was it?  
A. No, sir.

Q. That was the function of Mr. Jack Holmes, was it not?  
A. That I don't know.

Q. In other words, you were distinctly an operator of the machine, to deposit the concrete wherever Jack Holmes or somebody else told you to deposit it?  
A. That's right.

Q. And if he told you to stack it up in a pile you would have done it?  
A. No.

Q. Why not?

A. That would not have been necessary.

Q. Well, I say, if he told you—he was your superior, was he not?  
A. Sure.

Q. Yes, sir; so you had no volition at all as to handling [782] the matter, did you?

(Testimony of Theodore Gallowa.)

A. Well, your Honor, counsel, that would have been very much unnecessary to pour concrete out on the ground just because he said so.

Q. Now, you spoke of the carpenters excavating. Will you honestly tell me exactly what you saw the carpenters doing with a shovel? Just step to this table and illustrate, will you?

A. Well, I wasn't right up against them in the hole. It was a few hundred feet away.

Q. Oh, this was a few hundred feet away you saw that? A. Yes.

Q. Now, what do you mean by excavating?

A. They were digging. Now, what they were digging down in that hole I don't know.

Q. No, sir, and you don't know whether they were digging to set the form in or not, do you?

A. No.

Q. And you don't know whether the form was too large or too small or anything of the sort, do you? A. Well, I don't believe they did.

Q. I don't care what you believe; you didn't know, did you? A. No.

Q. And you didn't take the trouble to go up there a few hundred feet and look before you took this stand, did [783] you, sir? A. No.

Q. And you didn't take the trouble to make any note of any kind, did you? A. No, sir.

Q. Now, were you subpoenaed in Portland to come here? A. No, sir.

Q. Who made the arrangement for you to come?

A. Mr. Schaefer and Mr. Darcy.



(Testimony of Theodore Gallowa.)

Q. And what is the arrangement?

A. They made the arrangement to pay my expense.

Q. What about your earnings from your present employer while you're here?

A. That stops.

Q. You lose that, do you?      A. Yes.

Q. Did Mr. Schaefer take a statement from you, sir, before this trial?      A. No.

Q. Now, you say that you twice built bridges? Where?      A. On job 1062.

Q. Yes; where, sir?

A. Well, as to the exact location I couldn't say, but it was, let's see, south and east of the supposedly airport.

Q. On this job? [784]      A. Yes, sir.

Q. On the supposedly airport, you say?

A. Yes, south and east of the Sunnyside airport.

Q. And did you build those, or did you have a foreman over you on those, sir?

A. We had a foreman over us on those.

Q. Who was that?      A. Mr. Pat Darcy.

Q. Well, Mr. Pat Darcy was carpenter foreman, wasn't he?

A. He was superintendent of the job.

Q. Oh, yes. Now, when you told counsel about this place where you saw the strong-back close up against the bank, and about 10 feet out at the top—10 inches out at the top, pardon me, did I understand you to say to counsel that was typical, generally?      A. Yes.

(Testimony of Theodore Gallowa.)

Q. How do you know, sir?

A. Well, I was right there pouring the structures.

Q. Are you talking about the excavations in which the forms had been placed and which you were pouring?

A. Yes.

Q. You're not talking about any excavations in which the forms had not yet been built, are you?

A. Oh, no.

Q. Now, in those instances, did you get off your mixer and [785] go and get down in and inspect, sir, or not?

A. No, I didn't make it a natural practice of inspecting.

Q. What, sir?

A. I didn't make it a natural practice of inspecting.

Q. Your function is to stand there on that mixer and pour the concrete when they want it, isn't it, where they want it?

A. Not necessarily so.

Q. Isn't that your main function?

A. That's my main function.

Q. And the tamping of the concrete and the building of the concrete into the forms, that isn't your work at all, is it, sir?

A. No.

Q. Was there any single excavation into which you actually climbed and made measurements and made notations?

A. No.

Q. Or upon which you reported to either Mr. Jack Holmes or Mr. Darcy, while you were there, so they made measurements in your presence?

A. No.

(Testimony of Theodore Galloway.)

Q. All right, sir. Now, you say Mr. Darcy told you you would be sent back to Portland, and you were sent back; do you remember that?

A. Yes, sir. [786]

Q. When did Mr. Darcy tell you you would be sent back to Portland?

A. When we were caught up with our——

Q. Well, when was that, sir?

A. As to the date?

Q. Yes. A. That I couldn't say.

Q. When did you go back to Portland, sir?

A. Whenever we were caught up with our pouring.

Q. When, sir; what date?

A. I had no idea the dates would ever be mentioned.

Q. Approximate month?

A. I couldn't say.

Q. Did you have any idea that this strong-back up against the wall would ever be mentioned, sir? A. Never.

Q. Now, counsel asked you if what you had been telling was the general situation and you said it was, didn't you? A. Yes.

Q. Now, is that amplified or clarified by what you've told me since, that it refers to those structures around which you were pouring concrete?

A. Yes.

Q. Have you ever operated a transit mixer?

A. No. [787]

(Testimony of Theodore Gallowa.)

Q. Yours is what they call a batch mixer, isn't it?      A. Yes.

Q. And a transit mixer is one where the ingredients are put in the cylinder and that is revolved in going from the source of supply to the place of deposit?      A. It's mixed in transit, yes.

Q. Now, isn't it a fact that a transit mixer is generally used, quite generally used in building operations?      A. It wasn't at that time.

Q. In 1944 you say it was not?

A. Yes, sir.

Q. In the Portland area, sir?      A. Yes.

Q. Are you acquainted with the Porter Yett operations in Portland; were you acquainted with those?

Mr. Olson: Which was that?

Mr. Holman: Porter Yett.

Mr. Olson: I object to that, being immaterial, your Honor.

The Court: Sustained.

Mr. Holman: It's collateral, your Honor.

The Court: Sustained.

Mr. Holman: That's all.

### Cross-Examination

By Mr. Hawkins:

Q. Did you operate the Mixomobile or the Buggymobile, sir? [788]      A. The Mixomobile.

Q. It was the Buggymobile that actually poured the concrete in the structure?      A. No, sir.

(Testimony of Theodore Gallowa.)

Q. It was the Mixomobile that did that?

A. Yes, sir.

Q. What function did the Buggymobile serve?

A. The Buggymobile was used in pouring concrete into the structures that we were not able to get to with the Mixomobile.

Q. Now, if the side of the excavation had been six or eight feet or ten feet from the form wall, how would you pour the concrete into the form with the Mixomobile?

A. We had a long chute.

Q. You had a long chute? A. Yes, sir.

Q. And the same thing was true with the Buggymobile, I take it? A. That's right.

Q. As I understand your testimony, the men working for Macri were never ahead of you, is that right? That is, your pouring caught up with them right all the time? A. Yes.

Mr. Hawkins: I think that's all.

The Court: Mr. Ivy? [789]

Mr. Ivy: No questions, your Honor.

### Redirect Examination

By Mr. Olson:

Q. Mr. Gallowa, showing you plaintiff's Exhibit 49-1, I ask you what that is?

A. That is the Mixomobile that I operated.

Q. And that shows a tower on it. Was that tower later removed? A. Yes, sir.

Q. By whom? A. By the concrete crew.



(Testimony of Theodore Gallowa.)

Q. And how long after you started the job?

A. Oh, about eight or ten days; maybe two weeks.

Q. Now, showing you plaintiff's—

The Court: Let's see, what was that first one? That's in evidence, isn't it?

Q. Yes, Exhibit 49-1; and then plaintiff's Exhibit 49, being pictures 36 and 35, what does that show?

A. That shows the Mixomobile with the tower off, and a chute attached, pouring concrete.

Q. Is that the same Mixomobile, except for the tower, that's shown on the first pictures, number 1?

A. That's right.

Mr. Olson: That's all.

The Court: Any further recross?

Mr. Holman: No, your Honor. [790]

The Court: Do you have any, Mr. Hawkins?

Mr. Hawkins: Yes, your Honor.

### Recross-Examination

By Mr. Hawkins:

Q. With reference to this Mixomobile, as I understand it, you never used the chute?

The Court: It was the tower you were talking about? A. The tower.

Q. You never used the long chute?

A. Oh, yes, we did.

The Court: Did understand that correctly? It was the tower you were talking about, or the chute?

(Testimony of Theodore Gallowa.)

Mr. Olson: There was a chute in connection with the tower which was taken off.

The Court: May I see the picture, please?

Mr. Holman: May I ask another question, your Honor?

The Court: Yes, surely.

### Recross-Examination

By Mr. Holman:

Q. The walls of the structures varied in width, did they not, sir?

A. Do you mean as to the thickness of concrete?

Q. Yes, sir.           A. Yes.

Q. And the chute out of the Mixomobile would have to be [791] adjusted to those different thicknesses of width, would it not?

A. No, not the different thicknesses of width.

Q. Different thicknesses of concrete, pardon me. In other words, would the chute be poured longitudinally of an interstice between the forms, or would it be poured at right angles to the form?

A. It was poured 'most any way that we could get it in there.

Q. Now, sir, is there less difficulty, less probability of spilling concrete in a seven inch wall to be poured than there is in a five?

A. Naturally.

Q. And when you were answering me you spilled almost no concrete, did you check afterwards to find out whether you did or not?

A. That was checked by the foreman.

(Testimony of Theodore Gallowa.)

Q. Yes, sir; then what you told me is what the foreman told you? I'm asking what you know.

A. What was that question again, please?

The Court: Read it.

(Whereupon, the reporter read the last previous question.)

The Court: Do you understand what the previous question was? [792] A. No, I do not.

Q. Well, I'll re-ask it, Mr. Gallowa. You've told me that you stayed principally on the machine to discharge the concrete as directed by the concrete foreman and the other crew working in the structure excavation? A. Yes.

Q. Now, when you had discharged your load, did you have any function to go and check that concrete? A. No.

Q. And you didn't, did you, sir?

A. Well, I noticed whether I spilled some or not. They told me to shut it down or give them concrete. I noticed at the end of the chute whether it went over or didn't go over.

Q. You noticed whether it would go in between the two walls? A. Yes, sir.

Q. And of course, if it was going in between the walls it was not spilling outside?

A. That's right.

Q. But if there was any additional discharge of concrete beyond the capacity of the wall it would go over, would it not? A. No, sir.

Q. It wouldn't? A. No, sir. [793]

Q. Where would it go?

(Testimony of Theodore Gallowa.)

A. We had what we call a piece of metal that we held up on the side so it would not go over.

Q. In other words, you put a buffet up there?

A. That's right.

Q. You didn't, however, get off of your Mix-master—Mixomobile, and come over on the other side and check the concrete as it was pouring from the Mixomobile?

A. I had no need to check it.

Q. I say, you didn't do it, sir?                      A. No.

Q. And you never at any time did that as part of your functioning?                      A. No.

Q. Whatever went on in the form itself was the matter of your concrete foreman and the others who had charge of distributing that concrete around the form?                      A. That's right.

Mr. Holman: I think that's all.

#### Recross-Examination

By Mr. Hawkins:

Q. How close to the edge of the excavation did you drive your Mixomobile?

A. That's hard to answer. Sometimes it was very, very close.

Q. Sometimes very, very close; you were the driver of the Mixomobile? [794]                      A. Yes, sir.

Q. Did you ever knock any of the dirt from the excavation down into the hole?                      A. No.

Q. You never did?

A. We blocked that before we got there.

(Testimony of Theodore Gallowa.)

Q. Oh, you blocked that up before you got there?

A. No, we blocked the mixer with whatever boards or blocks were around there; once in a while rocks. We would block the mixer so we couldn't go back but so far.

Mr. Hawkins: I see; that's all.

### Recross-Examination

By Mr. Holman:

Q. Well, could you tell me approximately how close to a structure excavation wall you came with the mixer; two feet, three feet, five feet, ten feet; how far?

A. Oh, we never did get any closer than maybe five or eight feet, in that matter.

Mr. Holman: That's all, sir.

The Court: Any further questions, Mr. Olson?

Mr. Olson: No, sir.

The Court: You may be excused, then.

(Whereupon, there being no further questions, the witness was excused.)

### JACK MILLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [795]

### Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Jack Miller.



(Testimony of Jack Miller.)

Q. Where do you live, Mr. Miller?

A. Portland, Oregon.

Q. And by whom are you now employed?

A. Concrete Construction.

Q. In 1944 were you employed on the Roza Project, 1062, in Yakima County?

A. Yes, sir.

Q. And in what capacity?

A. Mixer operator.

Q. And what period of time did you work on the job, if you remember?

A. December 4 through March 31, '45, I think it was.

Q. That is, December 4, '44?

A. That's right.

Q. Through March 31, 1945?

A. That's right.

Q. Now, specifically, just what was your work, Jack?

A. Mixer operator.

Q. Did you operate the same machine that Mr. Gallowa had previously operated?

A. Yes, I did.

Mr. Holman: Well, just a minute; well, O.K., it [796] would be based on hearsay, wouldn't it?

The Court: Well, ask him what machine he operated.

Mr. Holman: That's right.

(Testimony of Jack Miller.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, now, Jack, did you have an opportunity to and did you observe some of the excavations within which the forms had been placed?

A. I did.

Q. And did you in your work from the time you went to work, would you pour in each excavation structure, in each structure?

A. During the time I was there, yes.

Q. In other words, there wasn't two crews of you that alternated structures? A. No.

Q. But you were on each one?

A. That's right.

Q. Did you have an opportunity to see any of the excavations before forms were placed in them.

A. I did.

Q. Now, would you describe those excavations with reference to the banks, whether there was slope in the banks, or what the situation was there?

A. Vertical. [797]

Q. Now, after the forms had been placed in these structures, or in these excavations, what was the situation with reference to clearance, lateral clearance? A. Tight.

Q. And by tight what do you mean?

A. There was no clearance, no room, after the form was in there, the strong-backs were placed, why, there was absolutely no room between them.

(Testimony of Jack Miller.)

I've seen several, particularly at the bottom.

Q. Did you see any occasions where the bank had been dug into to accommodate the strong-back?

Mr. Hawkins: I object to that question as leading.

Mr. Holman: I do too, your Honor.

The Court: Well, it's sustained. It is leading.

Q. Did you help remove any of the panels, Mr. Miller?           A. No, sir.

Q. You didn't help remove any; did you see any of them removed?           A. Yes, sir.

Q. Would you describe what you saw with reference to the panels being removed?

A. I seen the boys working with bars, shovels, two by fours, that they used as a lever to raise these forms out of the hole, and often cases where they've dug into the bank to [798] give clearance for their so-called she-bolts, and the bottom whaler or strong-back, to give clearance enough to lift the form up. On one occasion I had an opportunity to see a crew where they hooked a chain onto a panel, outside panel, speaking of, and pulled it out of the hole with the aid of a truck, because the men couldn't get around it to lift it up. It was too tight against the bank.

Q. What were the depths of some of these excavations?           A. Depth?

Q. Depth, how deep were they?

A. Well, they vary as to the type of structure.

Q. Well, can you say from such and such a dimension to some other dimension or depth?

(Testimony of Jack Miller.)

A. Oh, I would say an average, around three or four feet, something like that.

Q. And how deep would some of the deeper ones be?

A. Oh, I believe one there, around eight foot deep. That was over toward the end of the job.

Q. And were there any others that were approximately that deep?

A. Oh, they averaged, like I say, around three or four feet deep.

Q. Now, were you caught up in your pouring operations? Did you have enough work to do in your concrete pouring? [799]

A. No.

Q. What I'm getting at, were you working to capacity?

A. No.

Q. Explain what the situation was in that regard, and what caused it, if you know?

A. Well, you're referring to capacity, and we never was at capacity, because we never had forms enough ahead to pour to.

Q. Did you do any other work besides your concrete pouring?

A. No, sir, outside of maintenance of the equipment; other than that, no.

Q. What was the situation with reference to roads?

A. Well, there was places there——

Mr. Holman: That's objected to, your Honor, under the sub-contract and the principal contract, as being an operation of the sub-contractor, therefore not in issue.

(Testimony of Jack Miller.)

The Court: I'll overrule the objection.

Q. Were there roads provided on the project?

A. Well, yes and no. What I mean by that, there was county roads there, main arteries; other than that, why, no; when you get off into the field a way there was no roads at all.

Q. Now, were you able to pour concrete every day, except for holidays and Sundays were you able to? [800]

A. Oh, no.

Q. Were these shut-downs? A. Yes.

Q. Can you tell the Court approximately how often, for how long a period of time?

A. Well, it happened quite frequently we shut down on account of no forms available to pour.

Q. How long would you be shut down?

A. Oh, anywhere from two days a week, one day a week, to maybe—there was one time there I think we were down a week for the carpenters to get caught up and get a few structures ahead of us so we could come back and really start in again.

Mr. Olson: You may examine.

#### Cross-Examination

By Mr. Holman:

Q. Mr. Miller, were you the concrete foreman, or just the same, in the same capacity, as Mr. Gallowa that testified?

A. I was mixer operator.

Q. Then you had a concrete foreman over you?

A. That's right.

Q. Now, you told counsel that you observed the excavations in which the forms had been set. Do



(Testimony of Jack Miller.)

you mean that you made measurements or determinations yourself as to those excavations, or that you just saw them while you were on the mixer? [801]

A. I saw them as they were; no measurements or anything like that.

Q. You made no measurements?

A. Oh, no.

Q. You didn't go down into the excavations?

A. I have, yes.

Q. Yes; did you make any notes of any excavations in which you went, yourself, and made observations you testified about? A. No, sir.

Q. And who was your concrete foreman?

A. Mr. Jack Holmes.

Q. Same gentleman? A. That's right.

Q. All right, and did you at the time you saw what you told counsel make any report to him, calling his attention to the particular structure as to number? A. No, sir.

Q. And as to what you saw, sir?

A. We discussed the matter, yes, but as far as numbers or laterals, no.

Q. You didn't say this was structure number so and so? A. No.

Q. Or he did not say it, or there were no notes made? A. No. [802]

Q. Now, did you make any notation or report of any kind to Mr. Pat Darcy? A. No, sir.

Q. And counsel asked you if you were employed by the Concrete Construction Company in 1944, and I believe you said you were then and are now. Have you been continuously since? A. That's right.

(Testimony of Jack Miller.)

Q. When Ted Gallowa was up here you were not on this job? A. That's right.

Q. In other words, you replaced Ted Gallowa, is that right? A. That's right.

Q. And did you bring up any additional equipment of any kind from Portland for your pouring operations? A. No, no.

Q. Or did Jack Holmes order any?

A. That I wouldn't say to.

Q. I mean to your knowledge?

A. Well, that I wouldn't say.

Q. Well, do you know? A. No, I don't.

Q. Well, that's all right.

A. He took care of that himself.

Q. O.K. Now, the Mixomobile which you operated, and which is shown here by 49-1, I believe the photograph is, was [803] operating primarily in the placement of concrete for building, was it not, before it came here?

A. That mixer to my understanding was bought for this job.

Q. What do you mean by your understanding, sir? You mean somebody told you?

A. No, I seen it when it arrived down there, shipped up here.

Q. You what, please?

A. I was there when it arrived in the warehouse in Portland, and was immediately sent right up here.

Q. You tell me, sir, that that Mixomobile had not operated in Portland before it came here?

(Testimony of Jack Miller.)

A. As I say, I understood it was bought purposely for this job.

Q. You tell me now, sir, that you saw it arrive as purchased, and immediately shipped up here without operating in Portland?

A. Well, I wouldn't say that; we have a number of jobs. Like I told you, to my understanding it was bought for this job.

Mr. Olson: I don't believe this is proper cross-examination. I didn't go into the Portland operations with this man. I asked him about what he did out on this Roza project. Now, counsel's done this two or three times, gone into what happened down in Portland. My only [804] objection is it takes a lot of time, and doesn't relate to anything I interrogated about.

The Court: I think it might be material to show where this machine was used before, if he knew it, but ordinarily a man operating a machine wouldn't know where his boss got it, or where it operated.

Mr. Holman: That is correct. The only way it got my attention was he was there to say it came up here without operating at all. That's what I was interested in.

The Court: Well, proceed, then.

Cross-Examination

(Continued)

By Mr. Holman:

Q. How long have you been a concrete pourer, Mr. Miller?

A. I didn't understand that part.

(Testimony of Jack Miller.)

Q. How long have you been a concrete pourer?

A. Concrete pourer?

Q. P-o-u-r-e-r, yes, pouring concrete?

A. You mean an operator, then?

Q. If you called it operator; you know what I mean, sir.

A. Well, I've been doing that approximately two years.

Q. Well, what were you doing in 1944?

A. Previous to coming up here?

Q. Yes.

A. Pouring buildings, driveways, sidewalks, and the like of that. [805]

Q. Pouring concrete? A. That's right.

Q. And with the same type of mixer?

A. We have another one of the same type, yes.

Q. That was the one you were using?

A. Yes.

Q. Now, isn't it a fact that in pouring for buildings or basements there is a structure built somewhat of the same general plan, but much larger, than one of these structures in the field here, but your whole pouring operation is at one time, in one spot, isn't it? A. That's right.

Q. And if you're pouring a concrete wall it is all one operation, a continuous line operation, isn't it? A. That's right.

Q. Now, this wasn't a continuous line operation, was it? A. On 1062?

Q. Yes, sir.

A. We had a brief movement in between each structure.

(Testimony of Jack Miller.)

Q. Would you say it was brief to move a half mile?

A. It would only take a few minutes to move that far.

Q. Or a quarter of a mile? That would only take a few minutes? A. That's right.

Q. But you wouldn't have a line operation like you would [806] pouring the basement or the wall of a building, would you? A. Oh, no.

Q. And this Mixomobile is for that type of operation, line operation?

A. That is designed for 'most any operation under pouring concrete.

Q. Yes, sir; isn't it primarily designed for pouring mass concrete in line of operation?

Mr. Olson: It's not proper cross-examination.

The Court: I'll overrule the objection. He may answer if he knows.

A. That mixer is designed for mass operation, yes.

Mr. Holman: That's all.

The Court: Any questions, Mr. Hawkins?

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Miller, did the mixer ever break down while you were on the job?

A. A couple of different times, yes.

Q. Did you ever have any trouble with the roads while you were on the job, getting the mixer around on account of the roads? A. Yes, sir.



(Testimony of Jack Miller.)

Q. Well, with reference to capacity operation, the roads would have prevented you from operating at capacity at [807] any rate, would they not?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)

A. Well, I just don't quite understand how to answer that one. If we had had better roads out there we could have poured at better conditions, or more concrete.

Q. In other words, condition of the roads is one of the things that help you up on that job?

A. Well, not too much.

Q. But it was one of the things that did hold you up on the job?      A. Well, yes.

Q. And on occasion you had difficulty getting cement, is that not right?

A. That I don't know.

Q. Were you ever held up by lack of cement?

A. That was out of line; every time we was ready to pour concrete it seemed to me the cement material was always available.

Q. Did you ever operate the Buggymobile, sir?

A. The Buggymobile? No.

Q. With reference to this occasion when you saw a truck pulling one of the forms out, was that a deep excavation of six or eight feet, or was it one of the shallow ones, [808] three or four feet?

A. That was probably a six foot, I would say.

(Testimony of Jack Miller.)

Q. And did you get down and check the footing, to see what the condition was there?

A. The footing?

Q. Yes. A. No, I didn't.

Q. You wouldn't know, then, whether that form was being held in place by spillage cement, or not, would you?

A. That particular time that particular instance occurred——

Q. Just a moment; what did you say?

A. It occurred this way: We finished our pour about quarter after four, and the stripping crew was following behind, so I cleaned out the mixer and stepped back to watch the performance; I was interested, and that's when I seen it, and I did see that the bank was so close that it had caved in on the bottom strong-backs.

Q. It had caved in on the strong-back?

A. Yes, it was so close, in other words, vertical, the bank had caved in, and was jammed against the form, which wedged it in there.

Q. But you can't say that that was due to the spillage of concrete?

A. There was no concrete in there that I could see.

Q. Would that have been due to the Mixmobile operating too [809] close to the bank, to cause the caving? A. No, sir.

Q. What did cause the caving of the bank, then, if you know?

A. That's conditions that I couldn't tell you. It was natural, I guess.

(Testimony of Jack Miller.)

Q. Well, with the bank up against the strong-back there would be no occasion for it to cave in unless there was some weight put against it, is that right?

A. Well, you have lots of slides. I don't know how they start.

Mr. Ivy: No questions, sir.

The Court: Any further questions?

Mr. Olson: No, sir.

The Court: You may be excused, then.

(Whereupon, there being no further questions, the witness was excused.

(Short recess.

(All parties present as before, and the trial was resumed)

Mr. Hawkins: Your Honor, I wonder if Mr. Miller could be recalled to the stand for further questioning?

The Court: All right.

### JACK MILLER

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

### Cross-Examination

(Continued)

By Mr. Hawkins: [810]

Q. With reference to the capacity of this Mixomobile, how many yards can that Mixomobile pour in one hour?           A. In one hour?

(Testimony of Jack Miller.)

Q. Yes.

A. Under what conditions, please, are you referring to?

Q. The normal operating conditions.

A. At one standing setting?

Q. Yes.

Mr. Olson: If you know, Jack.

A. Oh, that I wouldn't answer to.

Q. Well, you operated this Mixomobile, did you not, sir?      A. That's right.

Q. And you don't know what its capacity is?

A. Well, that varies.

Q. Well, on direct examination you testified that you were never able to operate at capacity. Now, I presume that you must have something in mind when you speak of capacity.

A. Well, I'd say per hour we should hit, oh, twenty to thirty yards an hour.

Q. Twenty to thirty yards an hour?

A. Yes, sir.

Q. And did you know that there were approximately 1500 yards on this entire job 1062?

A. I did not know. [811]

Mr. Hawkins: All right, that's all.

The Court: Any other questions?

Mr. Olson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

## JACK HOLMES

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Olson:

Q. Your name is Jack Holmes? A. Right.

Q. Where do you live?

A. Portland, Oregon.

Q. And now, by whom are you employed?

A. Concrete Construction.

Q. During the summer of the year 1944 were you employed on Roza Project 1062?

A. That's right.

Q. And in what capacity?

A. What capacity?

Q. In what capacity were you employed?

A. As a foreman.

Q. And in what type of work?

A. On the concrete crew.

Q. Concrete foreman?

A. That's right. [812]

Q. And by whom?

A. Schaefer, Concrete Construction Company.

Q. All right; now, do you know the period that you worked on the project, about?

A. Approximately; well, it was from the 31st of July until the 30th of March in '45.

Q. You were with the concrete pouring throughout the entire job, then? A. Yes, sir.



(Testimony of Jack Holmes.)

Q. Now, I'll ask you first, were you right with the concrete pouring equipment as it was placing concrete in the structures? A. Yes, sir.

Q. And did you have an opportunity to and did you notice the clearance, if any, between the outside panel of the structures in the excavations, and the bank of the excavation?

A. They were tight.

Q. Could you amplify that word "tight" a little; bit, Jack, so we know whether you mean that there was some space, or that they were flush, or just how they were?

A. Well, they'd have to dig out sometimes to put the she-bolts in, and for the strong-backs and the whalers.

Q. Now, was that a general, typical situation existing in each of the structures? [813]

A. Yes, sir.

Q. Did you have an opportunity to and did you observe the carpenters doing any excavating?

A. Oh, just by traveling from one structure to the other, we would pass them, sometimes, and see the carpenters working, maybe; sometimes they were doing excavating with shovels.

Q. Now, was your crew able to operate, your concrete pouring crew able to operate to capacity, Mr. Holmes? A. No, sir.

Q. And why?

A. Because there were not enough structures ready.

(Testimony of Jack Holmes.)

Q. What part or parts or how much of the job was that true, that you were held up because structures were not ready, structure forms were not ready?

A. Well, some days, say the first of the week, why, we'd skip around and pick up the structures that was behind, that weren't ready at the time we passed them; we had to go back and pick them up always the first day, and then the next day, maybe we'd get an average pour, and then the third day, why, there was never a full day in the pouring.

Q. Well, how about the fourth and fifth day?

A. Well, generally I'd turn the concrete crew over to Mr. Darcy and I and the operator would catch up on the equipment, [814] what needed repair.

Q. Did that continue throughout your time on the project?      A. Yes, sir.

Q. Did you see them take any, or do any stripping, taking the forms off of the structures after concrete pouring?

A. Not much of that; just very little.

Q. Pardon?      A. I didn't.

Q. You didn't observe that?

A. I didn't observe that.

Q. You say you turned your crew over to Mr. Darcy?      A. That's right.

Q. When you were out of pour would that be your entire crew, or just part of it?

(Testimony of Jack Holmes.)

A. That would be the crew with the exception of the mixer operator and myself.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Holmes, you say you'd turn your crew over to Mr. Darcy, then do you say that your crew consisted of your mixer operator and yourself?

A. With the exceptions of myself and the mixer operator.

Q. Well, is that the concrete crew, you and the mixer operator? A. No, sir. [815]

Q. Who else did you have; I'm speaking now of the concrete crew, sir?

A. That's the truck drivers and the laborers.

Q. Yes, those that handled the concrete as distinguished from handling the forms or doing any shovel excavation or anything else?

A. I was speaking of the concrete crew.

Q. Yes; the concrete crew consists of what, you as the foreman, and an operator, and what else?

A. And two truck drivers.

Q. And two truck drivers?

A. And two laborers.

Q. Two truck drivers, two laborers, Mr. Holmes, and the equipment operator?

A. The mixer operator.

Q. The mixer operator. Now, was that a constant crew, right along?

A. That was the general——

(Testimony of Jack Holmes.)

Q. Sir?

A. That was the general crew that we had on the concrete.

Q. So that all of the time that you were pouring you had the two truck drivers, two laborers, yourself, and the mix operator?

A. That's right.

Q. Well, did the mix operator operate the Buggymobile, or [816] did you operate it, or who operated that?

A. The mixer operator, he stayed on the mixer.

Q. Well, who operated the Buggy?

A. Well, either one of the truck drivers or one of the laborers.

Q. That would be under your direction?

A. Yes.

Q. And will you explain what the Buggymobile was used for, in due relation to the Mixomobile? A. What it was used for?

Q. Yes, how did it co-ordinate with the Mixomobile?

A. Well, we used that in regards to structures that we couldn't get to with the mixer, some that was off in the fields too far.

Q. Yes, if it was a job too far away to pay to take the Mixomobile down there, then you'd send the Buggy? A. Yes, that's right.

Q. And would that be for small structures?

A. Not necessarily.

Q. Any structure, if it was better economy for the Concrete Construction Company, they'd send the Buggymobile instead of the Mixomobile?

(Testimony of Jack Holmes.)

A. That's right.

Q. Now, the Buggymobile was quite easily handled around, wasn't it, as I remember the picture, a little tricycle [817] effect?

A. It wasn't easy.

Q. It was light weight, wasn't it?

A. Yes, it could get over the ground.

Q. It could get over anything?

A. Well, I wouldn't say anything.

Q. Well, out there it was to get around anywhere?

A. To places where we couldn't get the Mixomobile; there was no roads.

Q. Just the same as tricycles, for quick delivery?

A. No, that was for places where there was no roads, and we couldn't get the Mixomobile down there because there was no roads.

Q. Now, had you ever operated on one of these reclamation projects before, where structures excavations were poured?

A. I was never a foreman on anything like that. I have worked as a laborer.

Q. Yes, sir; this was your first job as foreman on a reclamation project?

A. That's right.

Q. And in practice, isn't there a movement operation, dependent entirely upon the one driving the Mixomobile, as to where he sets it, and how close he sets it to an excavation, and where he sets it with respect to the [818] excavation, isn't that up to the driver of that Mixomobile?

A. That's up to me where he sets it.



(Testimony of Jack Holmes.)

Q. That's up to you? A. Yes, sir.

Q. Now, did you at any time stake any roads, or direct any roads to be made?

A. The roads was——

Q. Pardon me; answer me, please, whether you did or not. A. Direct the mix operator?

Q. Did you ever stake any roads, and direct that they be made?

Mr. Olson: That's objected to, if your Honor please. I didn't go into it with this witness. In the second place the Concrete crew certainly wouldn't be the road building crew, but it certainly wouldn't be proper cross-examination.

The Court: I'll overrule the objection.

Q. Answer the question, please.

A. Well, I didn't stake any roads, no, sir.

Q. No, sir, nor did you mark out any place where you wanted any roads, at any time?

A. Well, that really wasn't——

Q. Did you do it, please? Tell me whether you did it or not? [819] A. No.

Q. All right, sir. Did you make any notation of any structure that you inspected? A. No.

Q. Did you get down into any structure and inspect it, down in the structure itself?

A. As for what reason?

Q. Just inspect it, sir; you're testifying. Did you get down in those structures, in the excavations, and inspect them?

A. I went down in the structures; I inspected all the structures.

(Testimony of Jack Holmes.)

Q. Well, that was after they were poured?

A. That was before they were poured.

Q. You went down into the forms?

A. I was all around them, yes, sir.

Q. But did you make any measurements with respect to the structures?           A. No.

Q. The structure excavations; now, the matter of setting the forms up, bolting them together with the strong-backs and the she-bolts and so forth was not your operation, was it?           A. No, sir.

Q. That was an operation of some other person than yourself?           A. That's right. [820]

Q. And when you spoke of having to excavate to get the she-bolts in, and then put the strong-backs on, it's done in reverse order, isn't it, the strong-backs are on first, on the forms?

A. Well, they had to excavate to get those in.

Q. Can you tell me whether the strong backs are on first, before the she-bolts, or not?

A. Should be.

Q. Now, you say the excavations were tight, and both of your previous concrete men have said they were tight. Regardless of the excavation's position, was there anything to interfere with the pouring of the concrete in the forms, for your operation, once the forms were set up?

A. Yes, there was.

Q. Well, what?

A. Getting to the structures, for one thing.

Q. Well, that's this road question we covered, isn't it?           A. Yes.

(Testimony of Jack Holmes.)

Q. But let's for the minute eliminate the road question. Was there anything with respect to the actual location itself, once the form was in, that would hold up your pouring? A. No.

Q. So that if the forms were in, you could pour? A. Naturally.

Q. What is the hourly capacity of the Mixomobile for pouring? [821] A. On——

Q. Pouring, what is its capacity?

A. ——this job?

Q. Whether it poured on the floor of this room, or anywhere, what was the capacity of that Mixomobile?

A. Well, it varied from 12 to 25 an hour, I imagine.

Q. Depending on what?

A. On the conditions of the trucks, and getting the material to the mixer, and the forms.

Q. Well, assume that the Mixomobile is set in place and has a job of pouring ahead of it; what was its capacity?

A. Well, I say it varies.

Q. Well, you mean it might be delayed by the materials being brought to the Mixomobile?

A. That's right.

Q. The sacks of cement, and the sand and gravel, and so forth, had to be brought to the Mixomobile?

A. Yes, sir.

Q. And that was your trucks doing that?

A. That's right.

(Testimony of Jack Holmes.)

Q. And that was part of your operation?

A. That's part of the operation, yes.

Q. Under your direction as concrete foreman?

A. And in pouring, yes. [822]

Q. And as the Mixomobile moved further away from the source of supplies, was the trucking for the cement and the gravel and the sand also extended?

A. The trucks, we never waited on the trucks on this job at all.

Q. Never waited on the trucks? A. No.

Q. And if the Mixomobile was at one end of the job, and the supplies down at the other end of the job, is that where you would go for them, or would they be moved up?

A. That's where we went; one place all the time.

Q. And where was that?

A. That was over at the plant, over at the stock-piles.

Q. Over there, I think they called it the job yard, was that the place?

A. No, that was at the stock-piles.

Q. Where were the stock-piles, Mr. Holmes?

A. I don't remember the name of the road that they was on.

Q. They were on a road? A. Yes, sir.

Q. And each time that your Mixomobile needed new ammunition, so to say, new ingredients, your trucks would go back and bring them up and put them in? A. That's right.

(Testimony of Jack Holmes.)

Q. Now, you say there were no delays on that whatsoever? [823] A. No.

Q. The trucks never broke down? A. No.

Q. What was the average haul for the ingredients that went into the Mixomobile?

A. I didn't understand that.

Q. What was the average haul; how far would they haul it? A. What, the concrete?

Q. The ingredients that would go into the Mixomobile?

A. We didn't haul it in the Mixomobile; we hauled it in the trucks.

Q. I understand that; what would the average haul be?

A. From the stock pile to the Mixomobile?

Q. Well, what would it be, a mile, two miles, what would it be?

A. It varied from a mile, two miles, to eight miles.

Q. Did your crew stand by while the Mixomobile was mixing those ingredients?

A. Yes, sir.

Q. They remained idle?

A. If they had a load on them, they were standing by, yes.

Q. Yes, and if they deposited their load, what?

A. They would go back to the plant for more.

Q. Now, you told counsel that you would sometimes pass, and maybe sometimes there was a little excavation being done [824] by the carpenters; you



(Testimony of Jack Holmes.)

have no independent recollection of any particular place where the carpenters were doing excavation?

A. No.

Q. And when you use the term "excavation" what do you mean, Mr. Holmes?

A. In the word "excavation"?

Q. Yes; what do you mean, as a concrete man, when you talk about excavation?

A. Well, that's really out of my line; I didn't pay any attention to that at all, but excavating would be digging a hole.

Q. In other words, you haven't been and have never been an excavator?

A. Oh, yes, I was.

Q. Have you been an excavator?

A. I've dug holes with shovels, yes.

Q. Structure excavation? A. No.

Q. Well, I guess we've all dug holes with shovels, but I'm talking about structure excavation.

A. No, never did.

Q. And you have never fine graded?

A. No, sir.

Mr. Holman: That's all. [825]

The Court: Mr. Hawkins?

Mr. Hawkins: No cross-examination.

Mr. Ivy: No cross-examination.

The Court: Any redirect?

Mr. Olson: No.

The Court: You may be excused. Call the next witness.

(Whereupon, there being no further questions, the witness was excused.)

## A. E. MERCILLE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. A. E. Mercille.

Q. M-e-r-c-i-l-l-e? A. Yes.

Q. Where do you live?

A. Chewelah, Washington.

Q. Now, let me ask you this: Are you employed by the Concrete Construction Company now?

A. No.

Q. Were you employed by the Concrete Construction Company in 1944, on job 1062?

A. Yes.

Q. And in what capacity? [826]

A. I was carpenter.

Q. Now, did you assemble forms out on the field, or in the yard? A. In the yard.

Q. Did you assemble any of them out in the field? A. What is it?

Q. Did you do any work out in the field at all, carpenter's work? A. No.

Q. Now, in your assembling of forms there in the yard, did you have an opportunity to observe and did you observe the type of lumber that was furnished you? A. Yes.

Q. And would you describe it to the Court?

A. What kind of lumber we had?

(Testimony of A. E. Mercille.)

Q. Describe the lumber, yes, its condition.

A. We were short of lumber all the time.

Mr. Holman: Move that be stricken as not responsive.

The Court: Yes.

Q. As to condition?

The Court: He wants to know what kind of lumber it was.

A. We had shiplap, and two by four, and two by six, and two by twelve, and very little plywood.

Q. Now, will you describe it as to quality?

A. We had some good one, and lots of bad one; mostly bad one.

Q. And what was the matter with it?

A. It was too wet, rotten, knot hole every foot; get hold of a two by four and you had three pieces in your hand. You start to build a big panel, you had to splice it, nail it twice.

Q. Do you recall any used lumber coming in?

A. Yes, we had lots of used lumber.

Q. And what would be the condition of that lumber?

A. Oh, there was nails in it, and it was rotten, and tar paper.

Q. What would you have to do with that lumber?

A. We had to clean it all up and get it in shape to pass it through the saw and use it.

Q. Would it be possible to use the lumber with the nails still in it? A. No, sir.

Q. Could you use it with the tar paper still on it? A. No, sir.

(Testimony of A. E. Mercille.)

Q. And what did you have to do with the parts of it that was broken?

A. What we had to do with it?

Q. Yes; could you use the broken parts? [828]

A. Some of it we could cut in small pieces for different structures. Most of it we had to take another piece and use it.

Q. Now, with reference to whether or not you had a supply on hand to work with, did you have a supply on hand?

A. Sometimes we had some on hand, and sometimes we didn't have enough to complete a structure; we were short of so many pieces, short of two by four, sometime we had enough shiplap and no two by four at all.

Q. I didn't get the time, I don't think, Mr. Mercille. When did you start on this job?

A. March 14.

Q. That's right in the beginning? A. Yes.

Q. And how long were you on the project?

A. I was there until the last day, April—April, some time.

Q. You were there from beginning to end?

A. Yes, April, 1945.

Q. Now, how about your form making operations there in the yards; were you ever held up because of lumber? A. Yes, lots of times.

Q. And what about the—did you ever have to re-make any panels? A. Yes, lots of it.

Q. And what brought that about; why did you do it, or was [829] there any reason for it?

A. We made some new ones, you mean?

(Testimony of A. E. Mercille.)

Q. I asked if you ever had to take old panels and re-make them into new panels? A. Yes.

Q. What caused that?

A. Because we had no lumber in the yard.

Q. Did you do any re-assembling or patching in the old panels there? A. Yes.

Q. I notice on some of these exhibits here, these panels, which are plaintiff's exhibits 45, 46, 47, and 48, that there's some tin patch-work on them. Did you have any occasion to do any of that work?

A. I done pretty near 'em all.

Q. And just tell the Court where you got the tin, and how you happened to put it on.

A. I got that tin downtown in a grocery store, they were giving it away; and I took four or five pieces, and I cut them in four or five pieces, and put them over the knot-holes, and where the veneer has gone all to pieces, and make the concrete smooth.

Q. Now, I notice some of these panels here, and particularly plaintiff's Exhibit 45, has several pieces of veneer, and it is patched with veneer patches. Why was that done? [830]

A. Because we didn't have the right length of veneer; we had to put another piece on it, and cover that hole there, and it was all pieces.

Q. Why would you put these tin patches on the corner instead of taking a new piece of veneer?

A. We didn't have any.

Q. Didn't have any of them?

A. Any veneer.



(Testimony of A. E. Mercille.)

Q. What would you do, Mr. Mercille, when you ran out of lumber and didn't have any to work with?

A. Well, we worked on the steel work, and tear some old form and try to build a form to send in the field to keep the carpenters going.

Q. Now, did you ever—were you out on the field from time to time?

A. Yes, I hauled some structures in the field, and I took some back to the shop to fix it and re-build it.

Q. You say you hauled some out?

A. Yes.

Q. With a truck, or what?

A. With the truck.

Q. And you did what else?      A. What?

Q. You said something else about hauling.

A. Hauling some structures in the field, and taking some old [831] one back and re-build it in the yard.

Q. Now, when you did that, did you have an opportunity to observe excavations?      A. Yes.

Q. Did you go past any holes where the carpenters were working?

A. Pretty near all the holes, they were working on; you go by with the truck, they have a pick and shovel in their hand, and the carpenters doing the work.

Q. Did you see that?

A. Yes, I seen that thousands of times.

Q. Working with what?

(Testimony of A. E. Mercille.)

A. With a shovel and pick. When they put their form in, they was too short, or one short end, or too wide on the other. They had to dig it back. It was just a square hole.

Q. Now, I believe you said that you didn't assemble any of the forms in the holes themselves?

A. No.

Q. In connection with your hauling of panels out, and hauling them back, did you know whether or not the carpenters had to wait for an excavation to be ready for them to assemble the panels in?

A. Lots of times.

Q. Did you see that, did you, Mr. Mercille?

A. Yes, I seen it.

Q. Did you ever have to go out, or did you go out, and bring in to the yard from some other place?

Mr. Holman: Your Honor, I object to counsel calling for yes and no answers. This witness can tell what he did. I think it's leading.

The Court: Well, I think it's all right for him to ask that question. I'll overrule the objection, if he did go out.

Q. First, did you do it, Mr. Mercille?

A. Yes, sir.

Q. All right; now, would you tell of the occasion, and explain it?

A. I went down and got lumber on the other job to keep this job going. That lumber was supposed to be on our job.

Q. When you refer to the other job, what do you refer to, Mr. Mercille?

A. 58.

(Testimony of A. E. Mercille.)

Mr. Holman: 1068? A. 1068.

Q. You went down to 1068 and got lumber. Why did you do that, Mr. Mercille?

A. Because we had no lumber to work.

Q. Now, also in connection with hauling out panels and bringing them back in, did you have an opportunity to observe [833] any of the stripping, form stripping, taking forms off of the panels; did you have an opportunity to see that?

A. Yes, I see lots of it pulled off.

Q. And would you explain what you saw in that regard?

A. Well, they couldn't pull it off because there was no room to pull it off; the form was right against the dirt. They had to take the strong-back off and dig to get it out, and they used the truck several times, and they damaged the structure quite a bit.

Q. You say they damaged the what?

A. The form.

Q. Did you help do any of that stripping yourself, Mr. Mercille?

A. A few of it; not very many, because I was working, but with the truck I give them a hand to pull it out, because it was impossible to dig by hand, it was too hard, otherwise they take two or three hours.

Q. You helped with the truck, pulling them out. Now, were you ever with Mr. Macri on this job?

A. Yes, Mr. Macri come on the job, and it was impossible to go in the field. I took the truck and

(Testimony of A. E. Mercille.)

I took him over there. We measured a few structures and we come home.

Q. Who else was there?

A. The carpenter foreman on the job, Mr. Klugg.

Q. John Klugg? [834]                      A. Yes.

Q. And yourself?

A. Yes, and Mr. Macri.

Q. Who did the examining of the forms?

A. The carpenter foreman, and Mr. Macri was watching him, and so was I.

Q. Was there anything said in Mr. Macri's presence about whether they——

A. Mr. Macri said they was ready to go to work, Mr. Schaefer to go to work, and we said it was wrong, not ready to go to work, just a square hole. He talked to the foreman right there, and I was there, never measured myself, the foreman measured, and maybe one corner was all right and the rest was wrong, so we went back to the yard.

Q. How many excavations were checked?

A. Oh, we checked seven or eight, maybe nine.  
Mr. Olson: You may examine.

#### Cross-Examination

By Mr. Holman:

Q. And when was that you checked with Mr. Macri and Mr. Klugg?                      A. What is it?

Q. When; when?

A. I think that was done May 12, May 15 or 20, between that time. I don't know the exact date.

(Testimony of A. E. Mercille.)

Q. 1944? [835]           A. 1944.

Q. Did you make any note at that time?

A. No.

Q. Did Mr. Macri make any note in your presence?

A. I don't know; he just told my boss that those holes were not ready.

Q. Did Mr. Klugg make any note in your presence?

A. I don't know. To me? Oh, yes, he told me they were all wrong.

Q. Did Mr. Klugg make any note, write anything?

A. I didn't see him write anything.

Q. Did you see Mr. Macri write anything?

A. I don't know.

Q. Now, you say Klugg made all the measurements?           A. Yes.

Q. You didn't measure with Klugg?

A. No.

Q. Macri didn't measure with Klugg, Mr. Macri?

A. No, he just took Klugg's word.

Q. And did Klugg report these were out of line?

A. They were all wrong, he said.

Q. Pardon me; did Mr. Klugg report to Mr. Macri that they were out of line?

A. I don't know.

Q. No, sir; so when you say they were out of line, and so [836] forth, you're giving your own idea of what you saw at that time?



(Testimony of A. E. Mercille.)

A. Because the carpenter foreman was there and he measured it out, and he said they were all wrong, it was not ready for the structures.

Q. That's just what I asked you, if the carpenter foreman said they were out of line, and you said no.

Mr. Olson: That's not right. He said yes, and you said "reported"; that's what confused him.

Q. I don't want to confuse you. Did Mr. Klugg tell Mr. Macri that these forms, these excavations that you checked were out of line? A. Yes.

Q. Did he tell him that they were not completed?

A. Yes, he told him they were not completed.

Q. And what else did he tell him?

A. I don't know exactly what else he tell them; they were talking all the time.

Q. This is all in your hearing? A. Yes.

Q. Is it or is it not a fact that in that same meeting and conversation you made this statement, in substance, in the hearing of Mr. Macri and to him, that "I don't know why the Concrete Company doesn't fill these forms and get them back here so we can re-make them"? [837]

A. I never say no such thing.

Q. You never said any such a thing? Now, if there was any error in the forms themselves, the size, the panels in the forms as to dimensions, that would be your fault, wouldn't it?

A. Not exactly.

(Testimony of A. E. Mercille.)

Q. Well, it would be the fault of the carpenters, anyway, wouldn't it?

A. Those forms was made right from the structure it called for.

Q. Yes, but if it was made wrong, it would be you that was making it wrong, wouldn't it?

A. No.

Q. Who would be making it wrong?

A. The carpenter foreman is in charge of that.

Q. And who was your carpenter foreman?

A. John Klugg.

Q. Now, Mr. Mercille, isn't it a fact that you and John Klugg for some considerable time were the only two men making forms?

A. Yes, because we didn't have——

Q. How long was that?

A. Will you say it again?

Q. How long was that the case, just you two, just you two, Mr. Klugg and you, how long were just you two making [838] forms, the only two there?

A. Oh, there was more than two; we was three and four.

Q. Well, are you sure of that, sir?

A. In the yard?

Q. At the start; yes, sir.

A. Yes.

Q. How long were there three or four?

A. Oh, I can't recall it; they were there quite a while.

(Testimony of A. E. Mercille.)

Q. Was there any time that just you and Mr. Klugg were there?      A. Alone? No.

Q. And how large was the carpenter crew for the first five or six weeks?

A. We were four or five there, actually, all the time.

Q. Four or five; all right. Now, were you the one to estimate the quantity of lumber required for the forms for 1062?      A. No.

Q. Who did that?      A. I don't know.

Q. You didn't do it?      A. No.

Q. No, sir. Did you ever know how much lumber was delivered at the start for building forms for 1062?

A. I don't know exactly how much.

Q. Do you know how much lumber was delivered for building [839] forms before any form was filled with concrete?      A. Not very much.

Q. You don't know how much lumber?

A. No.

Q. Can you tell me whether or not you saw any forms built and remain in the field without concrete in them for several months?

A. Not for several months; just for a little while, because we were waiting.

Q. How long, sir?

A. I don't know exactly how long; I never checked.

Q. Isn't it a fact, Mr. Mercille, that forms were in the field as early as April, 1944?

A. I don't think we took any form in the field in April.

(Testimony of A. E. Mercille.)

Q. May, 1944?

A. I can't recall the date when we took it in the field.

Q. June, 1944?

A. Yes, there was from that time.

Q. Yes, sir, and were they filled with concrete then, or not?

A. I can't recall the day they started to pour concrete.

Q. No, sir; when did you first see any concrete poured in any of the forms?

A. I don't remember. I was not there in that part of the field; I was in the yard. [840]

Q. You saw them stripping, didn't you?

A. Yes.

Q. The concrete had been poured when you saw them stripping?

A. Yes, the concrete was in the form.

Q. When was that?

A. I can't give you the date.

Q. Did you see any forms in the field that had become weathered and checked?

A. Yes, there was some in the field that was checked.

Q. And you don't know how long they were there?      A. I don't know.

Q. Who delivered the forms from your job yard to the field?      A. I did.

Q. Yes, sir; then you do know of the delivery of every panel that went on the job, don't you?

A. Not every one of them.

(Testimony of A. E. Mercille.)

Q. Well, didn't you make the deliveries, sir?

A. Yes; not all the time.

Q. You didn't make the first deliveries?

A. Yes, I made the first deliveries.

Q. When did you make the first deliveries, approximately? A. I can't tell you.

Q. Now, was that the time that you were talking about the holes being dug wrong, and so forth, when you first made the deliveries? [841]

A. No, that's the time when we checked those structures with Mr. Macri.

Q. Well, didn't you tell me that was in May, you thought? A. Yes.

Q. Had there been forms put in by that time, or not?

A. Yes, there were forms put in by that time.

Q. Now, don't you know, sir, as a matter of fact, that there wasn't a bit of concrete poured until July 31?

A. I don't know which date; I know it was quite a little while.

Q. You were right here and heard these witnesses testify, did you not, sir? Now, is that your recollection, or not? A. What?

Q. Is it your recollection that there was any concrete poured before July 31, 1944?

A. I don't know when they started pouring concrete in those forms. That was the concrete crew.

Q. Can you tell me how much lumber, in board feet, was delivered to that job yard, that you know of?



(Testimony of A. E. Mercille.)

A. I don't know how many board feet; we got so little at a time it was hard to keep track of it.

Q. Just disregard anything except the question that I want to ask you, Mr. Mercille. Can you tell me approximately the number of board feet of lumber that was delivered to that job yard while you were there? [842] A. No.

Q. All right. Can you tell me approximately the quantity of veneer panels that was delivered there? A. There was very little.

Q. Can you tell me approximately the quantity, please? A. They came at different times.

Q. Can you tell me approximately the quantity, please, the amount?

A. I don't know the exact amount. The time they come, it's ten or fifteen sheets.

Q. Mr. Mercille, isn't it a fact, sir, that you kept charge of the veneer panels, they were not allowed to stay out in the yard, but they were kept in under Schaefer's roof?

A. No, that was not the fact. They never was in Schaefer's shack; they was in Mr. Macri's.

Q. Now, let's get to this second hand lumber and nails. Didn't that come off of one Mr. Schaefer built?

A. No, that lumber was new, that we used on the job, some of it.

Q. Wasn't the tar paper that you got back off that job afterwards?

(Testimony of A. E. Mercille.)

A. No, that lumber come from Seattle, and some other places.

The Court: We'll recess now until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.) [843]

Yakima, Washington, Monday, March 3, 1947,  
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Mr. Mercille, according to Macri's identification 16, the Concrete Construction Company payroll, a certified transcript of the labor payroll, I call your attention to the entry, "A. E. Mercille, 8 hours on Wednesday, March 15," the end of that week; now, that's the time you came on?

A. March 15.

Q. And at that time Mr. John Klugg was the carpenter foreman. Now, there was one other carpenter, was there not, Robert Conrad, was it?

A. Monrad.

Q. All right. Now, then, taking the next week, that was three of you that week, wasn't it? The next week shows in addition to you three men two others, does it not? A. Yes.

(Testimony of A. E. Mercille.)

Q. A man by the name of Golden and a man by the name of—— A. That's five.

Q. Yes, sir, Klugg remaining as carpenter foreman, and the rest of you as carpenters, correct?

A. Yes.

Q. Then it is a fact, is it not, in that payroll for the week [844] of March 29, Klugg remained the carpenter foreman, and F. E. Waltie was also marked as a carpenter foreman, right?

Mr. Olson: If your Honor please, I don't believe it is proper to cross-examine the witness as to a payroll which he obviously didn't keep; it was no part of his job, what the payroll shows, and the payroll would speak for itself, what it shows.

The Court: It doesn't strike me as proper cross-examination. He had nothing to do with making up the payroll.

Mr. Holman: I just had one more question to ask, your Honor.

The Court: Well, there's an objection made, which I'm inclined to sustain.

Mr. Holman: This next question I think will show it.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Was there any time that you became a carpenter foreman? A. Not on that job.

(Testimony of A. E. Mercille.)

Q. That's what I was after, your Honor. Did you sign some slips for receipt of lumber, Mr. Mercille, at the job yard?

A. I think I signed a few; there was nobody there. [845]

Q. Yes, sir; you were part of the Concrete Construction Company organization which came from Portland, were you not?

A. I was working for Concrete Construction Company.

Q. You had been previously working for the Concrete Construction down there in Portland?

A. Yes, I was working there in Portland.

Q. And you came up—— A. Yes.

Q. ——to this job—— A. Yes.

Q. ——as you say, on March 15. Now, are you still working with the Concrete Construction?

A. No.

Q. I believe you said you lived at Chewelah now?

A. Yes.

Q. You were on the job and saw all of the lumber which was delivered at the job yard through the whole of the performance of 1062, were you not? A. Yes.

Q. Can you now remember approximately the quantity of lumber in board feet? A. I don't.

Q. Had you before you came to 1062 worked on reclamation project forms before? [846]

A. Never.

Q. In other words, it was a new experience with you, on reclamation forms? A. Yes.

(Testimony of A. E. Mercille.)

Q. In any concrete form building is the practice to use the lumber but once, or use it frequently?

A. You could use it different times, if it's good to use.

Q. Yes, sir, as long as it is adaptable for a form requirement, it is expected, is it not, that it will be used again and again?

A. Yes, as long as the lumber is good.

Q. That's right, sir, and that is particularly true, is it not, with respect to the veneer lining for the forms, so that the concrete will have a smooth surface, correct?

A. I didn't hear that.

Q. Will you read the question?

(Whereupon, the reporter read the last previous question.)

A. Yes.

Q. And in the use of veneer it is usual, is it not, to patch it and re-use it?

A. Yes, when it's good enough you could patch some of them.

Q. And it is usual, is it not, to cover any breaks that come in the face of veneer, so that it can be used again, rather than discarded? [847]

A. Well, if you're able to use it; some of it was bad enough that you couldn't use it.

Q. Yes, I understand, when it gets to the point in the opinion of the man who's making the forms that it is no longer usable, then it is discarded, right?

A. Yes, sir.



(Testimony of A. E. Mercille.)

Q. But when it can be patched to be adaptable for forms, it is usually used, is it not; it is expected, isn't it? A. It is used again.

Q. Yes, if it could be used.

A. Yes, if it is good enough you could use it.

Q. All right, sir, and that's so also for the ship-lap and for the two by fours, is it not?

A. Yes, you could use it again if it is in good shape.

Q. Now, isn't it a fact, Mr. Mercille, that in almost every instance, when a structure form had been built and then assembled in the excavation, that before it could be used for another structure it had to go back to the shop to be re-cast to fit the next structure?

A. Yes, but there is some of it——

Q. Never mind the "but"; is that true?

A. If it is the right measurement of the next structure you could use it again.

Q. If it isn't, it has to be re-cast?

A. Yes, but there is lots of it fit the next structure. [848]

Q. If it fit, it doesn't have to be re-cast, but it has to be cleaned up, doesn't it? A. Yes.

Q. Was that your job? A. Yes.

Q. And if it was not the same shape of structure, and same dimensions, it had to be changed, didn't it? A. Yes, it had to be changed.

Q. And that was your job, wasn't it?

A. Yes.

(Testimony of A. E. Mercille.)

Q. Now, did you build the roof out of ship-lap that Macri furnished?

A. I helped on it, but not very much.

Q. All right, sir; how much was used for that purpose?      A. I don't know.

Q. And it was taken down afterwards, was it not?      A. Yes.

Q. What became of it?

A. We used it for the structures.

Q. It had nail holes in it, did it not?

A. Yes, but it was——

Q. Never mind the "but"; it had nail holes, didn't it?      A. Yes.

Q. And it had tar stains in it, didn't it?

A. We never used no tar. [849]

Q. No covering on it?

A. There was covering.

Q. What kind of covering did you use?

A. Paper.

Q. Tar paper?

A. No, that was building paper, black paper, it was no tar, and we never used no nails on it; we put strip on it so we would be able to use it without damaging it.

Q. Were you there when the lumber was used as a brace for the Mixomobile?      A. Yes.

Q. What kind of lumber was used there?

A. Four by six and four by four; we cut just a few of them to block the mixer.

Q. What quantity of lumber?

A. I don't know; I never kept track of it. I wasn't the concrete man.

(Testimony of A. E. Mercille.)

Q. And those were dimensions sent for the purpose of building forms?

A. No, I don't think so, because we never used four by six.

Q. Were they part of the lumber ordered?

A. No, they didn't belong to that job at all. They were all for some other purpose. They were only blocking that we gave to the mixer men to repair at that time.

Q. Now, if it has been told me that after that was used for [850] blocking the mixer, then it later went into forms, that would be error, wouldn't it?

Mr. Olson: If the Court please, that's argumentative.

The Court: I think it is. I'll sustain the objection.

Q. You say that that lumber cannot be used for forms, correct, that lumber that went under the Mixomobile couldn't be used for forms; it was for some other purpose, is that correct? A. Yes.

Q. And to your knowledge it was not used in forms, correct? A. Yes.

Q. What was it used for, sir?

A. For the mixer.

Q. Yes; after you took the mixer down off it, then what was it used for?

A. I don't know what they used it for.

Q. It was used, wasn't it?

A. I don't know.

Q. And you don't know the quantity of that?

(Testimony of A. E. Mercille.)

A. No, I never measured it up. I had nothing to do with what they were doing with the mixer.

Q. Now, I'll ask you if when the mixer was up on that form lumber, that lumber, that Mr. Macri didn't protest to [851] you that was a mis-use of the lumber furnished for that purpose?

A. I don't know.

Q. Didn't Macri talk to you and tell you you should go get cord-wood or something cheaper for that purpose?

A. He never say no such a thing to me.

Q. All right, sir. Now, it is a fact, isn't it, Mr. Mercille, that frequently you alone at the yard would load on to the truck a panel, all alone?

A. Not all alone; some of the men helped me when I could not put them in alone.

Q. You say you never loaded alone?

A. Oh, I might load a few.

Q. And do you say that you have never loaded the sides and the bottoms, including the veneer surfacing, alone on to the truck?

A. I might load some of it; not all of them.

Q. Yes, sir. Now, it is more than a one man job, isn't it?

A. That all depends what kind of truck you got and what kind of conditions you got to put them in the truck.

Q. I'm talking about the jobs you loaded, was more than a one man job?

A. Well, lots of times the carpenters in the yard helped.

(Testimony of A. E. Mercille.)

Q. But you did load a good many yourself?

A. I loaded a few. [852]

Q. And you loaded it and took it out to the job, didn't you?      A. Yes.

Q. Now, in loading it by yourself was there any chance that you might have chipped the veneer?

A. No, I never chipped no veneer.

Q. You said, I believe, on direct examination, that you saw a truck attached to pull out a form, didn't you?

A. I say I pulled some myself.

Q. Oh, yes; when?      A. During the job.

Q. What time during the job?

A. On several times.

Q. When did you first do that, sir?

A. I never put the date down.

Q. When did you first do that with respect to the first pouring of concrete?

A. I don't remember which day.

Q. Was it before or after the concrete had been poured?

A. Well, it was certainly after the concrete was poured.

Q. Yes, sir; now, was there any such operation in April?      A. I can't recall it.

Q. You do not recall any. What was an average day's output of form construction by you; how many did you put out?

A. I don't know, you generally work a couple of men together, and if we had the right kind of lumber for to finish one [853] form, we could do quite a few in one day.



(Testimony of A. E. Mercille.)

Q. Isn't it a fact, Mr. Mercille, that the veneer facing is the essential, necessary part that must be correct so that your finished concrete will be smooth; that's right, isn't it? A. Yes.

Q. Now, isn't it also a fact that the outer wall of the form, or the outer panel of the form, does not touch the concrete at all? Is that right?

Mr. Olson: How could that be?

A. What do you mean?

Q. Because it is lined with veneer, is how it could be. Is that right? Every place that your concrete goes in is faced with veneer, is it not?

A. No, sir.

Q. Sir? A. No, there's ship-lap.

Q. Isn't there a veneer lining, sir, to the panel?

A. No, that ship-lap on the outside.

Q. Sir? A. Ship-lap.

The Court: He said ship-lap on the outside.

Q. Yes, outside; but where the concrete touches?

The Court: No, he means the outside form.

Q. Do you mean on the outside of the outside form? I'm [854] talking about the inside of the outside form. Is that lined, or not?

A. That's ship-lap.

Q. It isn't lined with veneer?

A. Not all of them. Where the box is, that's veneer, and the outside wall, that ship-lap.

Q. The inside of the box is lined with veneer, the outside of the box is up against the ship-lap, is it?

(Testimony of A. E. Mercille.)

A. That depends on the different structures. That box, there, that's veneer, and the outside is ship-lap.

Q. But the concrete goes against the ship-lap?

A. On the inside, the veneer, and the outside, the ship-lap.

Q. Then the outside of the concrete structure will be up against the ship-lap, right?

A. I don't get you there.

Q. Well, if you're going to build a wall in these structures, the inside, as you call it, the inside of the box, will be faced with veneer, will it not?

A. Veneer.

Q. All right. Now, the outside wall which holds the concrete up against the veneer?

A. That's ship-lap.

Q. That's ship-lap, and then the outer wall will be right tight against ship-lap, and will not be lined with veneer, is that right? [855]

A. No, there's no veneer there.

Q. Also it is a fact, is it not, that after the structure is completed and the forms removed, those outside walls of the concrete structure will be rough, as against the inside, which will be smooth?

A. Yes.

Q. Because the outside does not touch water, does it; the water's all on the inside, right?

A. Yes.

Q. Now, do you say that you had two by fours which fell into three pieces when you handled them?

A. Yes.

(Testimony of A. E. Mercille.)

Q. You didn't use those, did you, sir?

A. We used it for different places, sometimes.

Q. You would cut out the knot breaks, or whatever it was, and use them somewhere else?

A. Yes.

Q. You knew as a practical proposition that at that time there was a great national shortage of lumber, did you not? A. Yes.

Q. And you knew you had to have priority to get any lumber, did you not? A. Yes.

Q. And you knew the type of lumber was just what you could [856] get, and that's all?

Mr. Olson: That's immaterial; whether or not Mr. Mercille knew it was hard to get would be immaterial.

The Court: Sustain the objection.

Mr. Holman: I'm talking about the conservation of lumber.

The Court: What is the materiality of it here, Mr. Holman?

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you take a man with you when you delivered forms out on the excavations?

A. Lots of times I took a man with me.

Q. When the forms were there did you set them in, or was there a crew there to set them in?

A. There was a crew there to set them in.

Q. In other words, that was not part of your functioning? A. No.

(Testimony of A. E. Mercille.)

Q. Isn't it a fact that so far as lumber from 1068 is concerned, that that job at that time was not operating, and that there was a different yard, job-yard, for 1068 than for 1062, right? A. Yes.

Q. And that you went to 1068 under arrangement with Macri's superintendent to get lumber?

A. Yes. [857]

Q. And borrowed the lumber from 1068 on to 1062? A. Yes.

Q. What quantity?

A. I hauled five load of it. I don't know; I never measured it up. The foreman was there, and he told me to only load so much. He say "We need that lumber here."

Q. Five loads in how many days?

A. Oh, I don't know how many days. I went there five different times.

Q. All right, five different days, then, sir?

A. Yes.

Q. All right; and how far did you drive?

A. To go over there?

Q. Yes.

A. I don't know; I guess it was five or six miles.

Q. Five miles, it would be fair to call it, would it?

A. I think it was more than five miles. I never measured the distance.

Q. Would six be fair?

A. Well, six or seven miles, anyway.

Q. Would seven be fair, sir?

A. I think so.

(Testimony of A. E. Mercille.)

Q. Seven would be fair to Mr. Schaefer, to call it seven?

A. I never measured the mileage. I don't know, I just went to get the lumber. [858]

Q. And the truck, of course, was operated by you?           A. Yes.

Q. Did you have a man with you?           A. No.

Q. Alone; all right.

A. We had Mr. Macri's foreman, sometime, or superintendent.

Q. Yes, but I'm talking about Schaefer just had you?           A. Just had me, yes.

Q. And how long would it take you to get a load from 1068 yard and carry it to 1062 yard?

A. How long it take?

Q. Yes.

A. That all depends on how much time I had to spend there. Mr. Macri's foreman just wanted me to take the rotten lumber, just take the pile and load.

Q. Which foreman was that?

A. Oh, there was a foreman on 1068.

Q. What was his name?

A. I don't know his name. I had an order from the foreman on 1062 to get lumber, because we didn't have any, and everybody was standing up in the yard.

Q. Well, how long did it take you to get that load of lumber and get it back to 1062?

A. Oh, two or three hours.



(Testimony of A. E. Mercille.)

Q. Would three hours per load for the five loads be fair? [859]

A. Three hours for the five loads? No.

Q. No, for each of the five loads?

A. Well, it would be three or four hours, because I had to wait.

Q. Well, you said three to four, sir. Is four hours fair, per load? A. Yes.

Q. All right, sir. Did you make any statement of the time, your time and the use of the truck, for that transfer? A. No.

Q. Did you report it to Mr. Darcy?

A. I don't know if Mr. Darcy made any. He was the superintendent of the job.

Q. I said did you report it to Mr. Darcy?

A. He knowed I was over there and got the lumber.

Q. Mr. Mercille, will you tell me whether you reported it to him or not?

A. Well, sometime he asked me if I got the lumber or not; I said yes. He saw it himself, there was nothing in the yard.

Q. I don't want to argue with you. I want to know if you gave Mr. Darcy a memorandum of the quantity of lumber you got, and when you got it, and where? A. No.

Q. Had you been a carpenter on building concrete work in [860] Portland before you came here?

A. Yes.

Q. How long? A. About since 1940.

Q. Since 1940; that would be about four years, then, before you came here, right? A. Yes.

(Testimony of A. E. Mercille.)

Q. Now, was this additional foreman, carpenter foreman, whose name I directed your attention to a while ago, a Portland man working with you down there?      A. What was his name?

Q. Well, one was Klugg, and the other man's name you gave me.

A. No, there was no——

Q. You were the only carpenter who came from Portland, were you, sir?

A. There was another carpenter there from Portland.

Q. What was his name?

A. George Shuler.

Q. You and George Shuler were the two who had worked for the Concrete Construction and came from Portland?      A. Yes.

Mr. Holman: All right; thank you, sir. That's all.

The Court: All right, Mr. Hawkins.

### Cross-Examination

By Mr. Hawkins:

Q. Mr. Mercille, on direct examination I believe you testified that some of the excavations were out of line, is that correct?      A. Yes.

Q. And did you measure those yourself——

A. No.

Q. To ascertain that fact? Mr. Klugg did?

A. Yes.

Q. And he told you at that time that they were out of line?      A. Yes.

(Testimony of A. E. Mercille.)

Q. And that's the reason you know now that they were out of line? A. Yes.

Mr. Hawkins: Your Honor, I move that that testimony of his on direct examination concerning the alignment of these excavations be stricken. It is obviously hearsay.

Mr. Holman: I join.

Mr. Olson: He testified directly to conversation and statements made in Mr. Macri's presence when they were out there inspecting these excavations with Mr. Macri and pointing these things out to Mr. Macri. It's what was said in Mr. Macri's presence.

Mr. Hawkins: That's no proof that those are the facts. [862]

The Court: It would be admissible if it were a statement made to Mr. Macri, in his presence.

Mr. Hawkins: His testimony was that Mr. Klugg told him that.

The Court: His testimony now, as I remember it, on direct, is he said it was his conversation with Mr. Macri. I'll deny the motion to strike.

Mr. Hawkins: I object to the testimony's admission for any purpose other than to show that statement was made to Mr. Macri. I do not think they are competent evidence that such fact existed.

The Court: I don't remember definitely whether he made any statement directly that the structures were out of line. If he did, that will be stricken or disregarded, but the part of his testimony had

(Testimony of A. E. Mercille.)

with Mr. Macri and in Mr. Macri's presence, as to the condition of the structures, and whether they were in line, will not be stricken. Proceed.

Cross-Examination  
(Continued)

By Mr. Hawkins:

Q. Did you have anything to do with the setting of the forms in the excavations? A. No.

Q. Did you have anything to do with the pouring of the concrete in the forms? A. No. [863]

Mr. Hawkins: That's all.

Mr. Ivy: No questions.

Mr. Olson: That's all. May Mr. Mercille be excused?

Mr. Hawkins: We have no objection.

Mr. Holman: Not at all.

(Whereupon, there being no further questions, the witness was excused.)

C. E. HEWITT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. Will you state your name, please?

A. C. E. Hewitt.

Q. And what is your occupation?

A. Civil Engineer.

(Testimony of C. E. Hewitt.)

Q. How long have you been a civil engineer?

A. Oh, about forty or fifty years; since I graduated.

Q. And where do you live? A. Yakima.

Q. And where have you practiced your profession of civil engineering?

A. Well, I have practiced in a number of the states, most of the central states, and——

Q. Well, how long have you been here in Yakima, Mr. Hewitt?

A. Thirty-five years; thirty-seven years, in fact.

Q. And during all of that time have you been engaged in the practice of your profession?

A. Yes.

Q. And are you now a duly licensed and practicing civil engineer in Yakima County, Washington? A. Yes.

Q. Now, Mr. Hewitt, did you at the request of Mr. Schaefer or his representatives inspect some of the excavations on project 1062 of the Bureau of Reclamation, near Sunnyside? A. Yes.

Q. Do you remember approximately the month when that was done?

A. That was done February, 1945.

Q. At that time were the excavations filled with a concrete structure. A. I didn't get that.

Q. Were the excavations filled or did they contain a concrete structure, at that time?

A. Concrete structure; the structure was in.

Q. Were the structures in? That's what I'm trying to get at. A. Yes.



(Testimony of C. E. Hewitt.)

Q. Did you at the request of Mr. Schaefer or his representatives make a diagram or chart showing the clearance between the structure and the bank, and also the slope of the bank? [865]

A. Yes.

Q. And do you have that with you?

A. Yes.

(Whereupon, the chart of structure excavation, by Hewitt, was marked Plaintiff's Exhibit No. 60 for identification.)

Q. Did you examine each of the structures on 1062, Mr. Hewitt?

A. No, I don't think all of them. Some were back filled, and you couldn't get the data that you wanted.

Q. Now, handing you plaintiff's identification 60, Mr. Hewitt, is that the chart which you prepared?

A. Yes, this is a cross section.

Q. That is a cross section chart?

A. This is a cross section of the structures as they were, showing the excavation at the side of the structure.

Q. Now, in making this chart, Mr. Hewitt, did you take—or just what did you do with reference to deciding what excavations to make a chart of?

A. Just took the measurements on the ground with reference to the structure that was in, and the banks of the excavation as it was on the ground.

Q. Well, was there anybody with you from the Concrete Construction Company when you took

(Testimony of C. E. Hewitt.)

these measurements on 1062, telling you which structure to pick out? [866]      A. No.

Q. What did you do in that regard, then?

A. I took the structures just as they came, from where we started down as far as we could get. The structures that were available there for measurement, I took all there were.

Q. All that were available for your measurements then?      A. Yes.

Q. And has that data been by you put on to this graph and chart?      A. Yes.

Q. What does it show, Mr. Hewitt? Not asking to the result, but what does it show with reference to the bank itself?

A. It shows the location of the bank with reference to what the bank would have been if it had been on a slope of one to one.

Q. And does it also show lateral clearance from the neat line of the concrete structure?

Mr. Olson: We offer this chart in evidence, being plaintiff's identification 60.

Mr. Holman: Let's take a look, if we may, your Honor. Is there a legend on this?

Mr. Olson: No. I'll go into that. It ties in [867] with the documents that are in evidence. I perhaps had better do that.

Mr. Holman: I wonder if you would?

Q. Mr. Hewitt, on the top of each one of these diagrams appears the words "page 69A" "page 68A" and so forth. What does that refer to?

A. It refers to the page of the plans of the Reclamation Bureau.

(Testimony of C. E. Hewitt.)

Q. And by that do you refer to the document which I now hand you, plaintiff's Exhibit 12?

A. Yes.

Q. As I understand it, then, the page number that is on identification 60 refers to the page number of the structure lay-out plan, Exhibit 12?

A. Yes.

Q. And there is also a structure number here, or a number here, 470, for instance, and 471, 463; what do these refer to, and similar numbers?

A. Those refer to numbers on the plans also, the same plan that the page refers to. These numbers will be found on the page that is given on there.

Q. Do they then identify a specific structure on the page indicated? A. Yes.

Q. So that by reference to that number you can turn the page [868] and find the exact structure to which that document refers? A. Yes.

Q. Then you have some notations here of "L" equals a certain number. What does that mean?

A. That's the length of the structure or the length of the excavation that was being considered, that particular wall.

Q. There is an arrow that ties in that "L equals so and so," to a certain blue line. Does that indicate that that length is the length of that particular bank? A. Yes.

Mr. Olson: Now, we offer the identification.

Mr. Holman: As illustrative of this witness' testimony?

(Testimony of C. E. Hewitt.)

Mr. Olson: No, I'm offering it not only as illustrative of his testimony, but showing his findings as a civil engineer of this job. I'm not limiting it to illustrative purposes.

Mr. Holman: I object, your Honor, for the reason that it has not yet been explained as to the details on it, for instance, blue lines, red lines.

Mr. Olson: Well, I'm happy to ask him that.

Mr. Holman: He hasn't explained that. What are they?

The Court: Is this a scale map? I assume it is.

Mr. Olson: Yes, your Honor.

The Court: The scale isn't indicated on it.

Witness: The scale is one inch to the foot. That's cross section paper. It is laid off in inch square, and those squares are one foot.

The Court: Is there anything else, perhaps you had better go into it before you renew your offer.

Mr. Olson: I was apparently unjustifiably anticipating an objection that the document wasn't in evidence.

### Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hewitt, will you explain the vertical red line on each diagram, as to what it indicates?

A. It indicates the neat line of the structure that was in place, of the concrete.

Q. Then, taking each diagram as you have marked off with the blue wavy line at the bottom

(Testimony of C. E. Hewitt.)

or base of that cross section, there is a horizontal red line. What does that indicate?

A. It indicates the distance one foot back, or what was required in the specifications for the excavation.

Mr. Hawkins: I move that that part of the answer be stricken.

Mr. Holman: I join.

The Court: As to what is required in the [870] specifications?

Mr. Holman: Yes; it is this witness' interpretation of the specifications.

The Court: I don't think it has been shown that he examined the specifications, has it?

Direct Examination  
(Continued)

By Mr. Olson:

Q. Did you examine the specifications.

A. I did.

Q. And is that answer which you just gave related to the specifications as you interpreted them?

A. Yes.

Mr. Hawkins: Your Honor, I've examined the specifications, and I have not yet found anything that requires the excavation to be one foot from the structure line, and one to one slope.

The Court: You mean in the sub-contract?

Mr. Hawkins: In the sub-contract and in the specifications themselves.



(Testimony of C. E. Hewitt.)

Mr. Olson: Well, I'll be happy to show it to counsel if you'll give me the specifications.

The Court: The thing I'm thinking about here, ordinarily I don't think it would be proper for a witness to testify as to what he regards the specifications to be, but this is a thought I have; an engineer, as an expert, would be capable of reading specifications and [871] drawing them out on the ground, and he could testify to that, I should think.

Q. Now, Mr. Hewitt, I hand you plaintiff's Exhibit 3, which contains, among others, this notation "Except for the limitation——

Mr. Holman: Just a minute. I submit counsel shouldn't answer for this witness.

The Court: He hasn't asked the question.

Mr. Holman: He's starting to read.

The Court: He's calling his attention to it.

Q. "Except for the limitation described above, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the foundation of the structure and to a slope of 1 to 1 for common excavation."

Is that the portion of the specifications to which you were referring?

A. That was my understanding of what it was.

Mr. Hawkins: Well, that's just exactly the answer to which I object. Counsel's been reading from a portion of paragraph 47, on page 22 and 23 of the specifications.



(Testimony of C. E. Hewitt.)

Mr. Holman: You will be two numbers short on the opposite one, your Honor, if that is 1068. It will be two numbers less, as I recall. I think it would be 45 there, your Honor.

The Court: Yes, I see it here. [872]

Mr. Hawkins: "The items on the schedule for excavations for structures include (reading from Exhibit 3). That, your Honor, I contend is the only provision in the specifications relating to excavation as such. What follows relates solely to the method of determining what the excavation contractor is going to be paid. Now, your Honor, there is not one word in these specifications whatsoever that requires that the excavation be a one foot lateral clearance plus a one to one slope. That formula is set forth here solely for determining the method of payment. In other words, if the contractor wants to excavate four or five feet on the side, he's not going to be paid for that. There is not one word in there that requires any slope to be imposed on these banks, and if the witness' diagram is based on this provision with respect to payment. I submit it is not admissible."

The Court: Well, there isn't any provision in that for clearance of any kind?

Mr. Hawkins: Just whatever in common practice is a reasonable clearance, in other words, the required excavation. In other words, if a one foot lateral clearance is sufficient for all normal operations, then that's all they're entitled to, and it is not a mathematical proposition of one foot out

(Testimony of C. E. Hewitt.)

and a one to one slope up that they're entitled to as a matter of law. [873] They're entitled to no such thing under these specifications.

Mr. Olson: If your Honor please, it is a unique argument to say "That's what they're paying for, but we didn't have to do that for which the government was paying." Certainly we're entitled to put this witness on the stand and to compare the slope on these banks as they existed to what it would have been on a one to one slope which Macri was paid for. I'm going to put a witness on the stand to show every one was paid for on a one to one slope.

Mr. Hawkins: I don't know about that. All I know is that one of the witnesses attempted to testify the method of payment was changed to vertical slope. Counsel objected to it on the ground all we were concerned with was the specifications and the interpretation to be placed on them by the Court.

The Court: I'll permit him to testify with reference to what they were with reference to what they would have been on a one to one slope, and we'll determine what the specifications are afterwards.

Mr. Holman: Your Honor, I join in Mr. Hawkins' objection.

The Court: The record may show that objection was made by both sides. The bonding company too, if they [874] wish.

Mr. Ivy: I understood earlier that the objection of one would carry the objection of all.

The Court: I think the record shows that.

(Testimony of C. E. Hewitt.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Did you testify to what the scale was on this?

A. One foot to the inch. One inch on the paper represents one foot on the ground.

Q. All right; now, each of these little squares, the map seems to be divided up into larger squares and smaller squares; the smaller squares indicate what distance?

A. One-tenth of a foot.

Mr. Holman: Those are the smallest?

A. The largest, on the heavier line, is one inch, and the inches are divided into ten parts on the metric scale; not inches, but tenths.

Q. That was that tenth they talk about?

A. Instead of twelve inches to a foot, there is ten tenths to a foot, and these inches are divided into ten equal parts.

Q. Now, the horizontal red line to the right of each of these structure diagrams indicates what?

A. It indicates the slope of one to one.

Q. That's a one to one slope? A. Yes.

Q. Now, the blue lines indicate what?

A. Indicates the banks as it was.

Q. I mean the blue straight lines.

A. The blue straight line, vertical, or nearly vertical, is the side of the bank, and the blue at the top was the top of the bank, so that the distance, the area between the red line and the two blue lines, is the area of the section that according

(Testimony of C. E. Hewitt.)

to my interpretation of the specifications would have been excavated had they been excavated according to the specifications, and the blue line showed where they were actually.

Q. Now, Mr. Hewitt, with reference to the depth of each one of these excavations, does that appear on the map?           A. Yes.

Q. And that's indicated how?

A. By a red line at the bottom of the excavation.

Q. That's the depth; in other words, that is the floor or the base?           A. The base, yes.

Q. Now, how can you tell from that how deep or how far from the bottom of that hole it is up to the top, by looking at this map, as it actually was?

A. Well, it indicates by the square, so many feet and tenths of a foot, as shown on the cross section.

Q. In other words, is the depth, then, of these excavations [876] shown on the same scale on this map?           A. Yes.

Q. So that by taking from the horizontal red line at the base of each diagram, going towards the top of the page on the blue line, and by using the scale, you can tell how deep that particular excavation is?           A. Yes.

Mr. Olson: Now, we re-offer plaintiff's identification 60.

Mr. Hawkins: Your Honor, may I ask one or two questions of the witness?

The Court: All right.

(Testimony of C. E. Hewitt.)

Voir Dire Examination

By Mr. Hawkins:

Q. How many structures are evidenced on your exhibit?      A. I couldn't say

Q. Could you count them and tell?

A. How's that?

Q. Could you count them and tell?

A. They could be counted, I guess.

Mr. Olson: Can you give us an approximation, Mr Hewitt?

A. In these structures where there was two or three compartments in a structure, why, they have different numbers. That is, if there is a concrete structure where it was an entrance for the water, the main part, and then it turned [877] out at one side, and turned out at the other side, those have different numbers, so that one structure on the ground may have two or three different numbers, indicating different parts of that what might be considered one structure; that is, it's in one place, but the structure has different numbers.

Voir Dire Examination

(Continued)

By Mr. Hawkins:

Q. You can't tell from that exhibit how many structures have been measured.

A. Yes, I think you can, or could, but I don't think I ever have.

(Testimony of C. E. Hewitt.)

Q. Does each one of those blue lines represent a separate structure?

A. I didn't get that.

Q. I say, does each one of those blue lines represent a separate structure?

A. No, they don't represent—they represent different parts of the excavation.

Q. Different slopes on the same excavation?

A. Yes, different walls; there would be one on one side, and maybe two or three sides on one structure

Q. How many different excavations, then, did you examine in making up this map or chart?

A. Well, I couldn't say. I've never counted them.

Q. Well, with reference to this exhibit, take this particular [878] square headed by page 68-A, does that represent—that entire section surrounded by the wavy blue line, represent just one excavation?

A. No, each one of these represents an excavation.

Q. Represents one excavation?

A. Yes, this represents one excavation, and this is another one

Q. And this is the third? A. Yes.

Q. So that this wavy line headed "page 68-A" represents three separate excavations.

A. Represents that page.

Q. Yes, but it also represents three separate excavations. Isn't that right, or not?



(Testimony of C. E. Hewitt.)

A. Well, I don't know; there is in that one four different ones in there.

Q. There is four different ones in here headed by page 68-A?

A. No, this is a different page.

Q. Just take this portion of your chart headed "page 68-A." Can you tell us how many excavations are represented by those drawings?

A. Well, I think it is three excavations.

Q. You think it is three excavations? How could you tell?

A. By these numbers that refer to here.

Q. What numbers? [879]

A. These numbers—447.

Q. And how about this one, 468? Does that represent an entirely different excavation?

A. Not necessarily.

Q. Not necessarily?

A. No, not necessarily.

Mr. Hawkins: Your Honor, I submit that exhibit is not properly qualified to be admitted in evidence. We don't know what it represents.

The Court: Do you have any questions?

Mr. Holman: I wanted to ask a question or two, if I may.

Q. (By Mr. Holman): Did you have field notes, Mr. Hewitt?

A. Beg pardon.

Q. Did you have field notes?

A. No, I had those plans.

(Testimony of C. E. Hewitt.)

Q. Did you make field notes, Mr. Hewitt?

A. Yes, I made the measurements.

Q. Where are your field notes?

A. Well, they're in those files.

Q. Will you produce your field notes, please?

A. They're there in the record.

Q. Well, they weren't in this, because I had this introduced. Where are your field notes? [880]

Mr. Olson: Well, I can get them, your Honor, here.

Mr. Holman: Will you, please?

The Court: Are they here in the courtroom?

Mr. Olson: I think so.

Mr. Holman: I'd like to have them.

Mr. Olson: Are these your field notes, Mr. Hewitt?

The Court: Let him look at them, and he can tell.

Witness: Yes.

Q. (By Mr. Holman): You say that you prepared these field notes?

A. Those are the plans that I took the notes of.

Q. Now, the fact is, with reference to Maeri's Exhibit 12, you have secured from the Bureau another set of plans of structures as represented by 12, have you not?

A. I don't know what 12 is.

Q. You're holding it right here, sir. That's right, is it not?

A. I don't know whether this is the same as that or not, but I got these plans from the Reclamation Bureau.

(Testimony of C. E. Hewitt.)

Q. Yes, sir; all right. Now, in order to clear the record, you see on 12, "Specifications 1062, structure lay-out," and you see on yours "Specifications 1062, structure lay-out"? A. Yes.

Q. Do you see the other wording below? It is the same on [881] both, is it not? A. Yes.

Q. You said you did get plans from the Bureau, and those are the plans you used in the field?

A. Yes, sir.

Q. Now, the markings which are foreign to the printed matter, let's say, the blue printed matter, are matters which you put on as a result of your field investigation, is that correct?

A. That's correct.

Q. Then this which you have indicated as your field notes is your record of original entries, correct? A. Yes.

Q. And plaintiff's identification 60 is your graph that you have built from your field notes, correct?

A. That's right.

Q. Then is there anything in 60 except illustrations of what you have already adapted in your field notes?

A. I don't think I get your question.

Q. Is there anything in 60 except what you have already indicated in your field notes?

A. No.

Q. In other words, then, 60 is for the purpose of emphasizing those things which do not show upon the government records, is that correct? [882]

(Testimony of C. E. Hewitt.)

Mr. Olson: That's objected to, if the Court please, asking for a conclusion of this witness, asking what the proof is.

The Court: I'll sustain the objection, and go back to your counsel table, Mr. Holman, except when you need to call the witness' attention to something.

Q. Yes, sir. Are these particular structures which are contained in the book your counsel furnished me the only ones you looked at?

A. The only ones that I have measurements on.

Q. Now, you made your computations also on this blue print reproduction of structures, did you not; you made your computations also upon this?

Mr. Olson: I don't think that is proper, your Honor, for the purpose of identifying this exhibit, what all he did on these field notes. I'm not offering the field notes.

The Court: We're just inquiring into whether or not this is admissible in evidence, of course, Mr. Holman.

Q. That's correct, your Honor, but what I would like to know is whether or not in addition to this which counsel has handed me, you actually made any note entries in the field. Did you make them right on these photostats or blue prints?

A. Yes, upon those or others that I had. [883]

Q. Did you make them in the field at the time, sir?

A. Yes.

Q. Then these are original entries, in reading here?

A. Yes.

(Testimony of C. E. Hewitt.)

Q. Now, could you get one structure there off of 60 that one could identify on your field notes? Take this particular one counsel was talking about, 68-A.

A. That doesn't seem to be here.

Q. Can you pick one up that does?

A. Here's page 45.

The Court: This pamphlet that you're holding in your hand, that bound document, that is not all of your field notes, Mr. Hewitt?

A. I was under the impression that they were all here, but there may be some pages that are missing.

Q. I find, Mr. Hewitt, 39, 40, 41, 42; you want 43, did you say?

A. Well, 45.

Q. Here's 45, is it not?

The Court: Well, is there a question propounded to this witness now?

Mr. Holman: Yes.

The Court: What is it?

Mr. Holman: I'm asking now with reference to 45. He selected page 45 as the portion of the structure as [884] shown by the blue prints that shows on 60.

A. Whatever number the structure is, the structure is numbered here, which is the same number that is given on the blue print, and the page, and that number 294 would be the number of the structure.

Q. Mr. Hewitt, isn't it a fact, or is it a fact, that the only portion of the structure as shown on page 45 which you have reproduced is the upright wall?

A. Yes, the upright wall.

(Testimony of C. E. Hewitt.)

Q. And the rest of it you don't show?

A. No.

Q. That's what I wanted to get at; and if it is a box structure, you don't show the whole box?

A. No.

Q. In other words, 60 is particularly for the purpose of showing elevations of the excavation, and excavation at the base of the structure?

A. Particularly showing the difference between the excavation as it was and what I understood it should be according to the specifications.

Mr. Holman: Well, I submit, your Honor, that the exhibit is purely argumentative in nature, and is based upon the engineer's interpretation of the plans of the specifications, as distinguished from the drawings as controlling for the job, shown by Macri's Exhibit 12. [885]

The Court: Any further objection to this document, this exhibit?

Mr. Hawkins: No further objection except the one that I have made already, that——

The Court: Well, let's not repeat that.

Mr. Hawkins: ——that the document is meaningless as far as I'm concerned.

The Court: The objections will be overruled. It will be admitted.

(Whereupon, plaintiff's Exhibit No. 60 for identification was admitted in evidence.)



(Testimony of C. E. Hewitt.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Hewitt, at the time you took these measurements, you said that the concrete structures were already in place? A. Yes.

Q. So that as far as the grade, or the sub-elevations of the excavations, they were covered with concrete, I take it?

A. On the plans there is an elevation given for the invert, or the finished concrete; then there was the thickness of the bottom and also an elevation for the top of the wall, and it was from those elevations that I calculated what the bottom of the excavation was to be.

Q. Now, showing you picture number 56, which is a part of [886] plaintiff's Exhibit 49, and I'll ask you if you recognize the gentleman shown in that picture alongside of that structure?

A. Yes.

Q. And who is it? A. That is myself.

Q. All right; then on that picture there is a white ruler of some kind reaching from the concrete structure horizontally out on top of the surface of the ground. Can you explain what that is intended to show, if you know?

A. It was to show the distance out of the excavation, where the excavation would have been had it been on a slope of one to one.

(Testimony of C. E. Hewitt.)

Q. Now, one more question, is that picture a fair reproduction of the condition of the bank and the lateral clearance as it existed there the day that picture was taken? A. I think so.

The Court: What picture is that?

Q. That's 56, your Honor, of Exhibit 49. Now, drawing your attention, Mr. Hewitt, to picture number 67 of Exhibit 49, apparently taken on the same day, February 9, 1945, also showing a white ruler or measurement extending horizontally on the top of the ground out to a stake, were you also present when that was taken? A. Yes, I was.

Q. And what does that indicate, that white line out to a stake from the concrete structure?

A. That is a six-foot rule, and the outer end of it is out to the distance that the bank would have been had it been on a slope of one to one.

Q. And is the bank as shown there, and the lateral clearance as shown there, a fair reproduction of the way that one was on that date?

A. Yes.

Q. Now, with reference to the lateral clearance and the bank shown in those two pictures, how do they illustrate, if they do, the general situation with reference to the banks and slope or lack of slope on the bank as you examined them in taking your measurements?

A. That the banks were practically vertical, that it was just a cut back, and the dirt was standing about as steep as it could stand as they were in the

(Testimony of C. E. Hewitt.)

excavation, without any slope or attempt to make a slope of one to one.

Mr. Olson: You may cross-examine.

### Cross-Examination

By Mr. Holman:

Q. Mr. Hewitt, who engaged your services for the purpose of your field work?

A. Mr. Schaefer.

Q. And was February 9, 1945, the first time that you in your [888] professional capacity for Mr. Schaefer had gone into the field?

A. I think it was.

Q. And at that time you were accompanied by his attorney, Mr. McKelvey, were you not?

A. Yes, sir.

Q. And at that time you had understood that there was to be litigation in court, and that you were acting as court engineer for the project, is that right, sir?

Mr. Olson: Now, what is a court engineer, Mr. Holman?

A. No, I don't think that's right.

The Court: Yes, I don't know what it is.

Mr. Hawkins: I always thought that was an attorney, your Honor.

Q. Well, you were making your field preparation for the purpose of testifying in this lawsuit, were you not?

A. I didn't know what the results would be.

Q. Well, you knew you were preparing the information for the purpose of use in court, did you not, Mr. Hewitt?

(Testimony of C. E. Hewitt.)

A. I didn't know that it would come to a court case.

Q. What were your instructions as engineer?

A. To get the structures, the excavations, as they were, compared with the excavations as they would have been had they been according to the specifications as I [889] understood them.

Mr. Hawkins: We again object to that, and move that it be stricken, your Honor.

Mr. Holman: I'll join, your Honor.

The Court: It will be denied.

Q. You had no instructions to determine a practical bank with due relationship to the character of soil for any structure, did you, Mr. Hewitt?

Mr. Olson: That question is objected to, your Honor, as not being a proper question, as to whether or not he had been given any instructions to arrive at a "practical bank". Can't tell what the question means.

Q. Well, you're familiar with——

The Court: Just a moment; I'll overrule the objection.

Q. Did you hear the question, Mr. Hewitt?

A. I was not given any instruction to determine any practical bank.

Q. Yes, sir. You have had opportunities to inspect field excavations on the Roza Project, have you not, Mr. Hewitt, in your experience as an engineer?

A. That I have had of other places, you mean?

(Testimony of C. E. Hewitt.)

Q. Yes, I said opportunity to inspect excavations for structures on the Roza Project.

A. Oh, I've seen them, yes. [890]

Q. Yes, sir. Have you seen any excavation cut to a one to one slope, one foot out from the neat line of any structure excavation on the Roza Project?

Mr. Olson: That's objected to, your Honor, as being wholly immaterial, whether Mr. Hewitt has seen any such excavation on another part of the Bureau of Reclamation Project or not.

The Court: I'll sustain the objection. It will be the view of the Court, unless persuaded to the contrary, that it wouldn't be proper to go into other sections of the Roza contract. If we did that we would have to go into the contracts and subcontracts and specifications of those also. Sustained.

Q. Mr. Hewitt, were you allowed any latitude in your instructions inside of one to one slope, to determine for those drawings?

Mr. Olson: That's objected to, your Honor, in asking for a conclusion of this witness, was he allowed. Maybe I don't understand his question, but if he's asking what he was allowed——

The Court: Let's read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I object to the question.

Mr. Holman: I think the question is prolix, and I'll strike it [891]



(Testimony of C. E. Hewitt.)

Q. What I would like to know, Mr. Hewitt, is whether or not your instructions were to produce a one to one slope as a result of your field inspection, against what it was; was that your instruction?

A. I was given a copy of the specifications and asked to determine what the excavations were with reference to those specifications.

Q. Will you tell me, please, whether or not you were asked to produce a one to one slope in Exhibit 60?

A. I don't know that I was, any more than that was what I understood that the specifications called for.

Q. Yes, sir, and you were to produce a slope of one to one except in solid rock, and that would be at a quarter to one, would it not? A. Yes.

Q. By the way, did you find any?

A. Some places there was stone.

Q. Did you find any rock excavation?

A. Yes.

Q. Did you produce any, sir, upon your chart, 60?

A. I'm not sure whether there is any of those that shows on that or not.

Q. Did you make any field notation of any of the rock structures? [892] A. I don't recall.

Q. Now, a quarter to one slope is for all practical purposes virtually a perpendicular wall in a three foot hole, isn't it?

A. No, it is a quarter of the distance, a quarter of the depth. A quarter to one would be out at the top one quarter of the depth.



(Testimony of C. E. Hewitt.)

Q. Yes, sir, one quarter of the depth down in a three foot hole.

A. In a four foot hole it would be one foot out at the top.

Q. Yes, sir. You saw no such structures?

A. I saw some structures where it was rocky on one side.

Q. But you didn't reproduce those?

A. I think they were back about that slope.

Q. Did you inquire before going into the field from the Bureau of Reclamation as to its method of payment under specification 47, which was read to you, read to the Court, pardon me, by Mr. Hawkins?

A. I don't think I inquired any more than of the specifications.

Q. I asked you if you inquired of the Bureau as to the method of payment?

A. No, I don't think so.

Q. Did you compute the area between a one to one slope and the actual ground slope on any of these structures which [893] you have shown upon Exhibit 60?

Mr. Olson: That's objected to, your Honor, as being immaterial, what the area was, or whether this witness computed it or whether he did not.

The Court: I don't see the purpose of it, Mr. Holman.

Mr. Holman: My purpose, your Honor, is if this witness has gone out there to establish an arbi-

(Testimony of C. E. Hewitt.)

trary one to one slope on a drawing as against the actual wall he found, if he can give me the volume in there, then we can compute that volume.

Mr. Olson: What counsel is getting after, as I see it, is how much more excavation it would have taken if they had excavated to a one to one slope, I assume, to show we could have gone in and done this excavating, and how many more cubic yards of dirt we would have to remove to do it. That's the thing I'm objecting to, because there was no obligation on us to do it. Mr. Macri was supposed to do the excavating, not us. We show the slope of the banks; that's all I've got this witness for.

The Court: Do you have something further to say?

Mr. Holman: Yes, I've got this to say; if this witness is to be helpful in the determination of the amount of earth removed by Schaefer for the purpose of guidance of this Court, that's one thing; if he isn't, I [894] submit his entire testimony is just——

The Court: Well, there's no contention, as I understand it, that Mr. Schaefer excavated on a slope of one to one. He excavated only such amount as was necessary to put in the structure. That is as I understand his position. I'll sustain the objection.

(Testimony of C. E. Hewitt.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, I believe you said that on plaintiff's Exhibit 60 the red indicates the slope at one to one, and the blue indicates the actual excavation, correct? A. Yes.

Q. How did you determine the angle shown by the blue on 60?

A. By measurements out from the concrete structure.

Q. Yes, sir; you took the completed concrete structure with the form removed, did you not?

A. Yes.

Q. As the neat line or the basic line from which you would measure out? A. Yes.

Q. And how many measurements did you make in a cut on the way up, from the bottom to the top, from that base line?

A. That would depend on the shape of the bank. If it was practically vertical there would just be one at the bottom and one at the top. If it was vertical part of the way up, and then a slope, there would be three; one at the [895] bottom, and one at the break where the slope was, and one at the top.

Q. Now, at the time you made the measurements, on I believe you said February 5, 1945, the entire operation of pouring the concrete and removing the forms had been consummated, had they not?

(Testimony of C. E. Hewitt.)

A. There was some, I think, that the forms were in.

Q. Sir?

A. The forms were off of most all of them, but I think at the lower end, I think there was some the forms were not yet off.

Q. On 60 do you indicate those structures where the forms were not yet off?

A. No, I don't think so.

Q. So there is no way of telling from 60 whether you measured from a naked, completed structure, or from the concrete?

A. Measured from the concrete.

Q. Well, how would you, where the form was on?

A. You can tell where the concrete was.

Q. Sir?

A. You can tell where the inside of the form is.

Q. You would just estimate, and measure, and make an offset?

A. Measure from the inside of the form.

Q. Did you show the base, or just the floor of the excavation; [896] the base of the structure, or just the floor of the excavation?

A. Just the floor of the excavation.

Q. Without regard to the base of the structure, or did you measure the floor of the completed structure?

A. What do you call the base of the concrete?

Q. The base of the concrete, where the concrete sits on the dirt; did you measure at that point, or did you measure from the floor, five inches or more above?

(Testimony of C. E. Hewitt.)

A. I took it from the elevation given on the structure, of what was required.

Q. Did you check against the control point in the field, the government's control point in the field, for elevation?

A. As to the elevation that was given on the bottom of the structure?

Q. Yes, sir. Did you check against the control point in the field, the actual stake? A. No.

Q. You didn't do that on any of these structures, sir? A. No, sir.

Q. Did you make any measurements from any engineering stakes in the field, to prepare 60?

A. Engineering stake?

Q. Yes, sir, any engineering stakes?

A. No, sir. [897]

Q. Did you make any determination as to alignment, forward or backward, on the station?

A. No, I didn't.

Q. What laterals were you on?

A. What laterals?

Q. Yes, sir.

A. Well, the laterals that were shown on that.

Q. What numbers? A. I couldn't say.

Q. How much territory, cross country, did you cover as to laterals? Did you work on one lateral only, or several?

A. I took all the structures from where we started, down as far as we went, that were available, that I could get in to; if there was some that were back filled there, of course I couldn't tell; others that were not were taken.

(Testimony of C. E. Hewitt.)

Q. You didn't inform yourself as to laterals, what laterals you were on?      A. No, I didn't.

The Court: We'll take a recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Hewitt, please, may I understand, are the blue lines [898] on 60 a copy you made off of the lay-out structures, but on a different scale? In other words, did you take the lay-out structures and compute the blue lines or extend the blue lines from the lay-out structures?

A. Yes, from the measurements.

Q. In other words, you took the lay-out structure and then you would reproduce the concrete wall, and that would be off of the lay-out structure; that's where you got the blue line?

A. Yes, this plat or cross section was made up in the office after the time that the measurements were taken on the field.

Q. Yes; now, then, the earth bank line was the result of measurements you made in the field, or estimates, which?      A. Yes, measurements.

Q. Measurements, sir?      A. Yes.



(Testimony of C. E. Hewitt.)

Q. Would you step here to 60 a minute? I'd like to ask you about one. Referring to the last drawing on the right side, in the upper corner, and to the more nearly perpendicular blue line, and its relative relationship to this irregular——

A. The irregular has nothing to do with it.

Q. In other words, the irregular has nothing to do with it?

A. Nothing to do with the measurements; simply separating [899] that.

Q. That is the graph that you have prepared inside of the regular line only, this side of it?

A. Yes.

Q. So that in every instance, on every one of these structures, the red line which you have extended, theoretically extended, not from measurement, but theoretically extended, is that the outside limits of the structure measurement?

A. That is the outside of the bank as it would have been had it been on a slope of one to one.

Q. And in each instance theoretical?

A. Yes, sir.

Q. And not upon any measurement of any kind in the field?

A. Well, there would be no occasion for any measurement in the field.

Q. Then your answer is that it is not based upon any measurement in the field? A. Yes, sir.

Q. Thank you, sir. Now, would you also while you're here, Mr. Hewitt, refer to picture 49-56, which counsel called to your attention, showing sta-

(Testimony of C. E. Hewitt.)

tion and structure 415-A. Have you reproduced that upon the graph?

A. I couldn't say for sure whether it is or not.

Q. With reference to 415-A, it shows on page 86, is that [900] 36, 66, or—— A. 86.

Q. Page 86, that would be, of the lay-out?

A. Yes.

Q. From your graph can you give the measurement at the base of the structure as shown in the photograph 49-56?

A. Well, there's several different walls there.

Q. Well, the wall that shows in the photograph; do you show it?

A. See, at the bottom there, there was four different walls in connection with that structure.

Q. Mr. Hewitt, this is a reproduction of you, isn't it, behind that structure in 49-56?

A. Yes.

Q. All right. Now, you see the point I am indicating where the earth is away from the structure, near the base of the structure, as shown in the photograph? A. Yes.

Q. All right; do you indicate that width on your graph?

A. Eight-tenths of a foot at the bottom.

Q. Eight-tenths at the bottom, you indicate the width as shown in the photograph. Can you tell me how much of the structure is below the photograph surface, and how much above?

A. No, I couldn't tell you. [901]

(Testimony of C. E. Hewitt.)

Q. So that photograph, 56, cannot, then, be fairly used with the graph to show a true condition, can it?

A. It does to me. It shows a true condition to me.

Q. The graph shows the true condition, does it not?

A. You couldn't get measurements from the picture, but it shows the condition.

Q. With reference to this picture 56, and calling your attention to the rule which you have out from the structure, do you not, to the earth surface——

A. Yes.

Q. Can you tell me from the graph the distance to the earth, at the surface of the soil, from the graph, can you tell me that?

A. I don't know what you mean by the distance to the earth.

Q. The distance to the earth from the structure, off of the graph? A. Yes.

Q. At the surface of the soil?

A. Yes; it is a foot and two-tenths.

Q. A foot and two-tenths; that would be about fourteen inches? A. Yes.

Q. A little over fourteen, would it not?

A. Yes.

Q. Yes, sir; and would you step here once more, please, Mr. Hewitt? I'm sorry. With reference to structures 427 and [902] 428, can you tell me, as shown by picture 67, Exhibit 49, sub-number 67, can you tell me whether or not that structure is reproduced on your graph?

A. That's 427 and 428?

(Testimony of C. E. Hewitt.)

Q. Yes.           A. Is this the page, 67?

Mr. Olson: No, that's the picture number. That has nothing to do with the page.

A. It's been over two years since I've seen this thing.

Q. Yes, sir.           A. Here's 468.

Q. No, 427, Mr. Hewitt. Is this 427 and 428 here, Mr. Hewitt, marked on page 65?           A. 427.

Q. Are those the structures shown in this picture 67?           A. Yes, I assume that they are.

Q. I don't want your assumption.

A. The number is what you have to go by.

Q. I see; you can't tell me?

A. I couldn't tell by looking at it. You have to go by the number.

Mr. Holman: I have no other questions, your Honor.

The Court: Mr. Hawkins?

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Hewitt, did you examine the specifications, 1062, [903] before you went out into the field?           A. Yes, sir.

Q. Did you read the entire set of specifications?

A. I couldn't say definitely.

Q. Well, to be perfectly frank about it, counsel called your attention to the paragraph 47, didn't he, and said "Those are the specifications"; isn't that what happened? Someone called your attention to that particular paragraph?

(Testimony of C. E. Hewitt.)

A. I don't recall that they did.

Q. You don't recall. You found that by reading through the whole——

A. I have a copy of the specifications in my office. I still have. I had all the time I was working.

Q. Yes, surely. Now, you read through the entire set of specifications?

A. I don't know that I did.

Q. You don't know that you did. Can you tell me whether there is any place other than page 23 that shows or purports to show any specifications with respect to excavation?

A. I don't know what pages they're on. That was just my interpretation of the specifications as I had them.

Q. At that time?                      A. At that time.

Q. And you can't say now whether you read the entire volume [904] or not?

A. No, I couldn't say.

Q. And you can't say whether someone called your attention to page 23 and you let it go at that?

A. I don't recall that.

Q. You don't recall that? It might be true?

A. Yes.

Q. It might be?

A. I don't recall who it was gave me the specifications now, whether I got it from Mr. McKelvey and Kelley; they was over here; they are the ones I went down and went over the project with in the first place.

(Testimony of C. E. Hewitt.)

Q. You talked to them before you went out on the project, of course; you had to talk to somebody before you went out?

A. Well, it was the attorney's office in Seattle that called me up and made an appointment to go down there.

Q. And in the meantime you obtained a copy of the specifications?

A. No, I didn't obtain anything.

Q. And the first time you had a copy of the specifications is when you went out?

A. I think it was the time they decided they wanted me to get some measurements; I hadn't seen them before that, so far as I know.

Q. At any rate, you can't point out at this time any other [905] part of plaintiff's 3 other than page 23, that sets for the purported specifications with respect to the excavation?

A. No, none that I know of.

Q. None that you know of. Do you know whether there are any plans either in the specifications or in the structure lay-out, for an excavation?

A. No, I don't know that there is.

Q. The structure lay-out, plaintiff's 12, does not set forth any diagram of any excavation, does it?

A. No, it doesn't show the excavation; it shows the structure.

Q. Pardon?

A. It just shows the structures.



(Testimony of C. E. Hewitt.)

Q. It just shows the structures, and so far as you know, there is no place either in the specifications or structure lay-out any diagram or plan of an excavation? A. Not that I know of.

Q. Yes. Now, when you went out to inspect these excavations in all cases the concrete had been poured, is that right? A. Yes.

Q. And the measurements that you obtained at that time were based on the actual condition of the bank, the soil bank, at that time? A. Yes.

Q. Did you take into consideration or make any allowance for [906] any dirt that might have spilled down over the bank against the form?

A. You'll notice on the plan that there is some places where it specifies that the dirt has sloughed in.

Q. Has sloughed in?

A. Has caved off after the time, possibly.

Q. And in how many cases did that occur, sir?

A. I don't know how many.

Q. Quite a few cases? A. Oh, several.

Q. Several, yes. Now, in some instances the forms had been stripped from the concrete at the time you were out there, is that not right?

A. I didn't get that.

Q. In some instances the forms had been stripped from the concrete? A. Most cases.

Q. That was true in most cases? A. Yes.

Q. Did you in making your notes out there, and in making up this graph, Exhibit 60, take into account or make any allowance for any soil that may have fallen into the excavation by reason of withdrawing the forms from the excavation?

(Testimony of C. E. Hewitt.)

A. Only in those cases, I think, where it is specified that [907] the dirt has been sloughed in.

Q. I see.

A. The only result of that would be that the banks would fall further back than they were originally.

Q. Not at the foot, though?                      A. Huh?

Q. Not at the foot, though?

A. Well, at the foot, of course, what falls in just raises up the elevation.

Q. Not only raise up the elevation, but it would also shorten the distance between the concrete wall and the bank, is that not right?                      A. No.

Q. You mean it wouldn't slide in the bank, it would just fill in flat in all cases?

A. Yes, practically so.

Q. Now, as a matter of fact, in almost every instance, did not dirt drop down in the excavation between the concrete wall and the bank?

A. Probably, more or less.

Q. Well, to be perfectly honest, that would invariably happen, wouldn't it, whenever they went out there and removed forms? Is that not right?

Mr. Olson: Your Honor, he wouldn't know that happened. [908]

The Court: I'll overrule the objection; go ahead.

A. Well, yes.

Q. Where the dirt had spilled in and, as you say, raised the elevation, did you take that out to observe the distance between the foot and the bank?

A. I did not.

(Testimony of C. E. Hewitt.)

Q. Then your graph is based upon your surmise as to what that distance actually was?

A. It is a measurement on the bottom as it stood on the ground, between the concrete and the bank.

Q. And your graph does not purport to be a measurement of the actual condition at the time the structure was placed in the excavation, before the concrete was poured into that?

A. If there were any difference, I think it would be less; that would be the only difference, the distance back would be less.

Q. Except at the foot, isn't that right? After there had been a cave-in there would be less distance at the foot? A. No, there would be more.

Q. More distance at the foot?

A. Yes, sir.

Q. Mr. Hewitt, if there were a ten-ton concrete mixer about five feet from the edge of the bank, do you think the operation of that mixer at that close proximity to the [909] edge of the bank would cause any cave-in? A. It might.

Mr. Hawkins: That's all.

#### Further Cross-Examination

By Mr. Holman:

Q. The stability of that soil, Mr. Hewitt, what is its angle of repose in these places you took these structures?

A. That bank in most places will stand practically vertical.

(Testimony of C. E. Hewitt.)

Q. You say its angle of repose is less than one to one?

A. In cutting that bank, I say on a cut bank it stood almost vertical.

Q. Well, is the natural angle of repose less than one to one?

Mr. Olson: The question has been answered. If it stands vertical, the angle of repose would be less than one to one.

Q. The natural angle of repose?

A. If it was loose dirt, of course, it would be flatter than a vertical slope.

Q. Yes, sir; the normal angle of repose of earth in that area where you made these measurements is what?

A. If it was loose dirt I presume it would be something like one half to one, something like that.

Q. You'd say the angle of repose is one half to one, sir?

A. Well, that would depend very much on conditions.

Q. Talking about these structures you were actually in.

A. Some of them was sandy structures, and some was volcanic [910] ash.

Q. All right, sir; what was the angle of repose as determined by you in sandy soil?

A. I didn't determine the angle of repose.

Q. What is the angle of repose in sandy structures? A. I don't know.

Q. And what is the angle of repose of ash?

A. I don't know.

(Testimony of C. E. Hewitt.)

Q. And what is the angle of repose in any other earth contained out there?

A. Well, the angle of repose varies with the condition of the soil and what kind of soil it is.

Q. What is the angle of repose of the rock?

A. Loose rock?

The Court: Did you say yes? You're nodding your head.

Mr. Holman: I asked him rock.

The Court: Well, is it loose rock, or solid rock?

Q. Any rock you encountered out there.

A. The angle of solid rock is to whatever you excavate, probably.

Q. Was that shattered or solid rock out there?

A. If it was loose rock the angle of repose is somewhere about 45 degrees.

Q. 45 degrees in shattered rock or loose rock?

A. Yes.

Q. Was that loose rock out there? A. No.

Q. Was it solid rock you encountered?

A. Rocky soil.

Q. What did you say the angle of repose was in solid rock?

The Court: Whatever you cut it, he said.

Q. Yes; but does it have an angle of repose, a natural angle of repose, solid rock?

A. No, solid rock does not.

Q. Did you in reading specification 47, which counsel read to you, make any distinction as to slope adaptability for pipe line excavation as against structure excavation?

(Testimony of C. E. Hewitt.)

Mr. Olson: That's objected to as being immaterial, because I didn't go into any pipe line excavations at all.

The Court; Sustained, as not proper cross-examination.

Q. Did you review the various typical graphs contained in drawings one through, oh, to the end of the book, in the specifications? Did you consult those various typical drawings?

A. I don't think I get your question.

Q. I wanted to know if you consulted these typical drawings in the back of the specifications, in making up your Exhibit 60? [912]

Mr. Olson: Do you know what he's asking you, or do you want to see them?

The Court: He had better look at it, if he's going to answer it intelligently.

Mr. Olson: You're asking with reference to 1062, counsel?

Q. Yes. Did you consider those drawings in the back, Mr. Hewitt?

A. I don't know that there's any drawings in here that I considered.

Q. I asked you, sir, if you considered them.

A. I don't think I referred to any typical drawings.

Q. Would you say, in making up Exhibit 60 and in preparation of your field notes on the blueprints that you had from the Bureau office, you did not consider any of the typical sections in the back of the specifications? A. I think not.

Q. Sir? A. No, sir.



Mr. Holman: That's all.

The Court: Any redirect?

Mr. Olson: No, your Honor.

The Court: That's all, then, Mr. Hewitt.

(Whereupon, there being no further questions, the witness was excused.) [913]

### JAMES A. BLACK

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Olson:

Q. State your name, please.

A. James A. Black.

Q. Where do you live?

A. Spokane, Washington.

Q. And by whom are you now employed?

A. H. H. Walker, Inc.

Q. By whom were you employed on specifications 1062 of the Roza Project.

A. Sam Macri Company.

Q. Did you work on both 1062 and 1068?

A. I did.

Q. And have been subpoenaed here by them?

A. Yes.

Q. In what capacity did you work on 1062?

A. As an engineer, doing fine grading?

Q. Doing fine grading? A. Yes.

Q. Were you or were you not superintendent at any time as far as 1062 was concerned?

A. No.

(Testimony of James A. Black.)

Q. With reference to 1068 what capacity if any, did you have? [914]           A. The same capacity?

Q. Fine grading?           A. Yes.

Q. You weren't the superintendent in charge of 1068?           A. Not until the last of the job.

Q. Now, when did you come on the job on 1062?

A. As near as I can recall, about November 21, 1944.

Q. November 21, 1944?           A. Yes.

Q. And who was the superintendent of 1062 at that time for Mr. Macri?           A. Mr. Stickney.

Q. And later on who?           A. Mr. King.

Q. Now, your specific job on 1062 was fine grading, you say?           A. Yes.

Q. Now, Mr. Black, state whether or not—that question may start out to be leading—what was the situation, Mr. Black, with reference to having available sufficient men under you to do the fine grading ahead of Mr. Schaefer's carpenters?

A. There was times when I had plenty of help, and there was other times I was very short.

Q. Were you or were you not able to complete the fine grading ahead of the carpenter crew? [915]

A. At times I was ahead, and at times they were right close to me.

Q. Were there times when the carpenter crew was delayed because of the fine grading not being done?           A. Yes, there was times.

Q. Do you recall having to return back on the job to do fine grading on holes that had been left?

A. Yes.

(Testimony of James A. Black.)

Q. And how far was it between excavations there, Mr. Black?

A. Oh, it would vary all the way from 60 to 1200 feet, probably; in rare cases it might be a little further, that is, on the laterals, and sometimes a half mile between laterals; however, in that instance, why, it would be about a half mile between structures.

Q. This was up to 1200 feet between excavations on one lateral? A. Yes.

Q. And then between laterals there would be how far, you say?

A. Oh, there would be up to a half mile; I don't believe it was over that, any time.

Q. Now, did Mr. Macri give you any instructions with reference to sub-grade?

A. Well, he told me at one time not to be too particular about it; to get the job done.

Q. Did he say anything about how close you were to come to [916] the sub-grade?

A. As I recall it, he said about two to three tenths.

Q. And how far off would that be in inches?

A. Well, that would be between two and a half and three or four inches.

Q. You mean two and half to four inches?

A. Approximately.

Q. Now, with reference to the outside banks, the bank of the excavations, were they at a 45 degree angle, or not? A. They were not.

(Testimony of James A. Black.)

Q. And what angle, if any, were they?

A. They were approximately vertical.

Q. Did you have the same crew of fine graders under you for any appreciable length of time on 1062?

A. Not a complete crew, no.

Q. Pardon?

A. Not as a complete crew, no.

Q. And what was the situation with reference to whether or not you had a continuous crew?

A. Well, some days Mr. King would need part of the men somewhere else, and I was left short. Other times I would have what I considered at that time about a full crew, five men.

Q. Now, you came on November 21?

A. Yes. [917]

Q. Did you continue on the fine grading, then, on 1062, from then on until you went to 1068?

A. I did.

Q. What was the situation of the ground at that time of the year?

A. Well, most of the time it was frozen.

Q. And did that facilitate your fine grading, or interfere with it?

A. Yes, it surely did.

Q. Well, it surely did what?

A. Slow it up to a great extent.

Q. Now, you say you didn't have the same crew to continue with you on 1062. How did that affect, if it did affect, in any way, your ability to continue with the fine grading in an orderly manner?

A. Well, I'd have to watch them more careful, and never could get them broke in completely as to

(Testimony of James A. Black.)

understand fine grading, and a lot of times when I'd have to be away, why, the work wasn't done as I laid it out, as it should have been.

Q. Now, with reference to job 1068, Mr. Black, did you have charge of and did you supervise the performance of the first fine grading on that job?

A. I did.

Q. And when was the first fine grading done on 1068? [918]

A. That started on the first day of February, 1945.

Q. Were there any structure excavations ready for the placing of concrete structures, or forms for concrete structures, prior to February 5, 1945?

Mr. Holman: Your Honor, I object to that as outside the issues in view of the exhibit already in the evidence showing that as of January 3, 1945, the job had been taken over from the Concrete Construction Company by Macri.

The Court: Well, I think it would have probative value only as it relates back.

Mr. Olson: Well, I can state what my position is. Counsel on November 30 directed us to go ahead and put in structures. On January 3 they held us in default. I'm showing that even up to February, 1945, following, there wasn't any excavations ready for forms to be put in. The purpose is to show by this witness that on November 30, when he told us to go to work, no holes were ready. On January 3, when they said we were in default, they still were not ready.

(Testimony of James A. Black.)

Mr. Holman: Until counsel shows he had structures ready to put in holes, it would be immaterial.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.) [919]

Witness: No.

Q. Now, you had an opportunity, Mr. Black, or did you, to observe the banks of the excavations made on 1068? A. Yes.

Q. And how were they made?

A. I tried to make them two foot out, from 18 inches to two foot out, on a vertical.

Q. And were they made vertical, or approximately so? A. Approximately.

Q. Now, with reference to 1068, when did they first start making forms, or do you know, for structures on 1068?

A. No, I couldn't tell you when they started making them in the yards.

Q. Were they making forms for structures on 1068 when you finished your first fine grading on February 5? A. Yes.

Q. Macri and Company was already making forms then? A. Yes.

Q. Now, do you know if Mr. Macri had sub-contracted the 1068 at that time?

A. No, I don't know.

Q. Was there anybody else beside you in charge of that work as far as the structure forms were concerned?



(Testimony of James A. Black.)

A. There was Mr. McCarthy and Mr. Burnsted there at that time. [920]

Q. And what did they have to do, if you know, with reference to 1068? What were they doing with reference to 1068?

A. Well, my understanding was——

Mr. Holman: Object to his understanding.

Q. What were they doing?

A. Mr. McCarthy was superintendent of the field work. Mr. Burnsted was doing the office work.

Q. Now, getting back for just a moment to 1062, how much hand labor would it take on those excavations, Mr. Black, in order to get them to the right sub-grade elevations?

A. Well, they varied considerably according to the structures. Some of the structures we could fine grade in possibly three hours, that's a crew of two men; there was other structures, a couple that I spent as much as 120 man hours; that was on the east turbine lateral and a few big structures.

Q. I take it you did not take 120 man hours on each one of these?

A. Oh, no, just that one particular structure.

Q. Now, where was Schaefer's crew on putting in their forms on 1062 as far as your excavations were concerned, your work was concerned?

A. Well, sometimes we'd be right close together, and there was other times I'd be off on a different lateral entirely, quite a ways away. [921]

Mr. Olson: You may examine.

(Testimony of James A. Black.)

Cross-Examination

By Mr. Holman:

Q. Mr. Black, was a statement secured from you by Mr. Schaefer before you took the stand?

A. Yes.

Mr. Holman: I call upon counsel to produce the statement.

Mr. Olson: I have the same objection, your Honor, not material, as shown by the last time that counsel called for it; it was refused from evidence. I say to your Honor I do have a photostatic copy, but I have not referred to it nor looked at it in any way in my direct examination. If your Honor suggests I give it to counsel I'll be happy to do so. I submit it is not material.

The Court: It doesn't seem to me, Mr. Holman, assuming you have a right to demand these statements, that your demand is timely at the conclusion of the testimony of the witness. There's a way for you to procure documents for inspection, and you haven't done that, and it doesn't seem to me we should take the time in this trial to have you demand and examine each one of these statements given some time prior to the trial.

Mr. Holman: Well, I'll cover it in another way.

The Court: All right.

Q. Mr. Black, you were subpoenaed by the United States [922] Marshal? A. I was.

Q. In Spokane, to come here as a witness for the defendants Macri? A. I was.

(Testimony of James A. Black.)

Q. And you were in your subpoena directed to bring all books, memoranda and records that you had, were you not? A. That's right.

Q. Did you have a copy of this statement?

A. Yes, I have a copy.

Q. Did you bring it? A. No, I didn't.

Q. And you have been here for a week, have you not? A. Yes.

Q. And there has been repeated requests that you secure that statement?

A. Well, you asked me to get a copy of it.

Q. Yes, sir, over Sunday, this last Sunday. Did you get it?

A. No, I didn't. I didn't go back to Spokane as I planned.

Mr. Olson: Your Honor, I don't want to take any chance on this thing. I'll submit it to counsel if he wants it. I haven't seen the original, counsel, but that is a photostatic copy. I also have no objection to it going into evidence.

Mr. Holman: I'm sorry, but you gave me John Klugg's statement. I don't want to read that one.

Mr. Olson: You can read it if you want it. Maybe I spoke too hastily. Do you mind if I read this first?

(Whereupon, Mr. Olson handed the statement of James A. Black to Mr. Holman.)

The Court: Am I correct in assuming that this witness was subpoenaed by Maceri first?

Mr. Holman: Yes, your Honor.

(Testimony of James A. Black.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. This statement was secured how long ago, Mr. Black?

A. I believe it was some time the latter part of October. I couldn't tell you the exact date.

Q. Now, did you notify Mr. Macri that a statement was secured from you?      A. No.

Mr. Olson: It is objected to as being immaterial. I don't see the purport of whether these people called Mr. Macri every time somebody called them, or they did something.

The Court: I'll sustain the objection.

Mr. Holman: Your Honor, I would like at this time to move that the direct testimony of the witness Black be stricken, on the ground that he has not complied with the subpoena served upon him; he has not produced the documents indicated. [924]

Mr. Olson: Your Honor——

The Court: Just a moment. He was subpoenaed by Macri to produce certain documents?

Mr. Holman: Yes, sir.

The Court: Does that prevent his being called, since he's here, by opposing counsel, without having the documents? I'm just trying to get your position here. It doesn't seem to me his testimony should be stricken, if it is material, just because he was subpoenaed by one side and is called by the other, and does not produce the documents under

(Testimony of James A. Black.)

the subpoena that was served upon him. Do you have anything to say in support of your motion?

Mr. Holman: Only, your Honor, that instead of the witness producing what we sought from him in preparation of our case, and the use of this witness, now called out of turn as plaintiff's witness, we are deprived of the information except at the graciousness of counsel.

The Court: Well, the Court doesn't know what subpoena you served upon him. It isn't in the record, is it? There isn't any showing that he hasn't complied with the subpoena.

Mr. Holman: It should be in the record; the Marshal served it.

The Court: What was it you demanded of him that he did not bring? [925]

Mr. Holman: All the records pertaining to this job; all documents. I haven't the exact wording, that's in the subpoena there.

The Court: Well, this seems to be sort of a blanket subpoena, asking him to bring everything that he has, every document, in connection with this job.

Mr. Holman: That's all we could do, your Honor.

The Court: Yes, of course, but what do you claim that he had, now, that he did not produce?

Mr. Holman: My claim is that having subpoenaed this witness through the Marshal's office in the regular course, at his regular place of residence, without the ability in advance to consult the matters



(Testimony of James A. Black.)

subpoenaed with this witness we are just deprived of a factual cross-examination where plaintiff brings him on the stand upon the same things, your Honor, this job.

Mr. Olson: I submit, your Honor, I have put counsel in a much more favorable position than he has any right to expect when I call his witness on direct and give counsel a right to cross-examination on matters on which I have interrogated. Certainly counsel can't say he was prejudiced at all.

The Court: I'll deny the motion.

Q. (By Mr. Holman): Mr. Stickney employed you, did he not, Mr. Black? [926]

A. Yes, he did.

Q. Now, you worked under Mr. Stickney. Did you work under Mr. Ashley? A. No.

Q. Who else did you say, under whom else?

A. Mr. King.

Q. Mr. King; and while you have been here you have roomed in the same hotel with Mr. Stickney?

A. Yes.

Q. And have been closely associated with him, have you not? A. Yes.

Q. Did you have any financial transactions between you and Mr. Stickney while you were here?

A. Just private.

Q. Private only, nothing to do with the compensation for this case, one way or the other?

A. No.

Q. You were in charge of the fine grading on 1062? A. The last part of it, yes.



(Testimony of James A. Black.)

Q. Well, from the time you went on?

A. Yes.

Q. Yes, so the fine grading from the time you went on to the end of your work on 1062 was a matter of your own volition, depending only upon man power, is that correct?

A. That's right. [927]

Q. Yes, and the employment of man power was a matter between you and first Mr. Stickney and later Mr. King as superintendents, right?

A. Well, it was up to Mr. King or Mr. Stickney to hire the help.

Q. And did you make requests for help that they refused you at any time?

A. I made requests for help; I wouldn't say they refused me. I don't know as they could get the men or not at that time.

Q. Wasn't it a fact also that at that time there was a very considerable shortage of labor available?

A. Yes, there was.

Mr. Olson: That's objected to as being immaterial, and I move the answer be stricken.

Mr. Holman: This is a question of good intent, your Honor, on the matter of Macri progressing with his work.

The Court: Well, I'll overrule it.

Q. You were not at any time denied the right to put on any fine graders if they were available, were you, Mr. Black?

Mr. Olson: That's objected to as not being material, whether he was denied the right to put on fine graders. The question is, were they there.

(Testimony of James A. Black.)

The Court: I'll sustain the objection. [928]

Q. Well, you said there were times when you had plenty of help, and times you didn't. Now, was that due to the labor market, or was that due to their being discharged, or what was the fact?

A. No, they weren't discharged. Mr. King had to take them to different parts of the job; he was trying to back fill and one thing and another, and he'd take them to different parts of the job, from me.

Q. But with your permission; they weren't just taken away from you?

A. Well, he'd tell me he had to have them.

Q. And you acquiesced?           A. Yes.

Q. Now, isn't it a fact when you first came onto the job, under Mr. Stickney, you superintended the hand excavation of one of the structures on lateral 59.3, I believe? I'm mentioning hand excavation, Mr. Black, as distinguished from shovel excavation; did you make a hand excavation there?

A. Well, I made several hand excavations, but I don't recall the lateral number.

Q. In other words, at times when the shovel or the hoe, it's been called both here, would be off at a distance cross country, or up a lateral, would there be hand excavation made by you? [929]

A. Yes.

Q. In lieu of the power excavation?

A. Yes, in preference to bringing back the hoe.

Q. When I say by you, that is made under your direction, under your supervision?           A. Yes.

(Testimony of James A. Black.)

Q. And were the excavators common labor?

A. Common labor.

Q. And the supervision of appropriate fine grading was your responsibility? A. Yes.

Q. Yes, sir. Did you have any conversation with Mr. Schaefer with respect to the fine grading?

A. I did not.

Q. Or with his representative, Mr. Darcy?

Mr. Olson: That's objected to, your Honor. I didn't go into the question of conversations.

Mr. Holman: I think counsel is right. I'll withdraw that question.

The Court: Yes, it is not proper cross-examination.

Mr. Holman: That's correct, sir.

Q. (By Mr. Holman): Did you determine any specific time that the carpenter crew was delayed because the fine grading had not been done?

A. No, only in one instance. [930]

Q. One instance is all that you know, Mr. Black?

A. That is, that I kept any time on.

Q. And what was that instance?

A. It happened to be a rock structure up on the hill, that the hoe didn't get to.

Q. Rock structure? A. Yes.

Q. Can you indicate the structure? Do you know the structure? A. I could pick it off the map.

Q. Off the work lay-out? A. Yes.

Q. Would you do that, please?

A. No, I meant the map.

(Testimony of James A. Black.)

Q. Referring to plaintiff's 22, can you call me that structure, please, Mr. Black?

A. It would be, I believe that is 285, on lateral 68.3.

Q. Structure 285 on lateral what, please?

A. That lateral number can't be right, I don't believe, on the map, or that structure number.

Q. Structure 285?

A. 285 D and E, is what is marked here.

Q. D and E?

A. D and E; there were five structures.

Q. And how much time was the carpenter crew delayed on that occasion? [931]

A. Well, they moved up there when I went up to fine grade it, and I was there two days and a half.

Q. Were they delayed two days and a half?

A. They were there practically all that time.

Q. They were delayed two days and a half?

A. Yes.

Q. And how many men were in the carpenter crew, do you know?      A. Carpenters?

Q. How many men in the carpenter crew?

A. Two.

Q. Two men; and when was that, about?

A. That, sir, I don't know. I gave Mr. King those notes that I kept on that.

Q. That's what I was going to ask you next. You reported to Mr. King and gave him that detail?

A. Yes.

(Testimony of James A. Black.)

Q. And before doing that, did you submit it to Mr. Darcy or anyone else so that they knew of that?

A. No, I didn't.

Q. Now, that was a case where the crew was held up because you couldn't do your fine grading in time?

A. Yes, that's right.

Q. Was there any other occasion that you can identify?

A. No, not as to the structure.

Q. Was any memorandum of any kind given to you by Mr. Darcy [932] or anyone for the Concrete Construction Company with respect to this delay that you've called my attention to?

A. No, not to me.

Q. Now, with respect to this fine grading being two to three tenths high, is that what you said, high, or off? High, wasn't it?

A. Yes.

Q. It wasn't ever performed by you below grade, was it?

A. Only in the instance where the hoe had over-dug.

Q. Only where the hole had been over-dug?

A. Where the hole had been over-dug by the hoe.

Q. Then you would go and tamp in the earth up to the grade where it should be?

A. Yes.

Q. You did that, did you not?

A. Yes, sir.

Q. And in these places where it was from two to three tenths above grade, that was for the purpose of preventing the shovel teeth from excavating down to disturb the actual grade, wasn't it?

A. Well, in some cases, and cases where the ground was frozen, yes, it was very hard to get it right on the nose.



(Testimony of James A. Black.)

Q. Yes, sir; in other words, at that particular time it was hard to get it to grade?

A. That's right. [933]

Q. And the reason for leaving it was to avoid disturbing the grade, so you wouldn't have to go back and tamp it, wasn't it?

A. Well, where I staked out structures for the hoe to dig I always made it a point to leave it at least five tenths high for hand digging.

Q. Yes, sir; that was contemplated for hand digging by the fine grading crew under your direction?

A. Yes.

Q. And that was a normal co-ordination between shovel excavation and hand grading?

A. Yes.

Q. Hand shoveling?           A. Yes.

Q. And that was the discussion you had with Mr. Macri, that same purpose, was it not?

A. I don't recall, now. I had two or three discussions with Mr. Macri on fine grading.

Q. Well, I refer to your direct examination; in substance, according to my note here, Mr. Macri had told you not to be too particular, to get the job done, and do it to two or three tenths, and I believe you told counsel that would be two and a half to four inches high?           A. That's right.

Q. That was the purpose of the talk between you and Mr. [934] Macri, also to expedite the job?

A. Well, I don't recall that that was the purpose at the time.

Q. But it was recognized you would go back and fine grade to grade, was it not?           A. Pardon?



(Testimony of James A. Black.)

Q. It was recognized you would go back and fine grade to grade?

A. I always made that attempt, yes.

Q. And you conscientiously made that attempt throughout, did you not?      A. I did.

Q. Sir?      A. I did.

Q. Can you give me the approximate time it would require for two men to fine grade a structure that had not been fine graded at all, an average structure, let's say a four foot deep structure?

A. A four foot deep structure?

Q. Yes, sir.

A. It would take them, on the average structure lay-out plan, about a day and a half, two men.

Q. A day and a half, one and a half days, to fine grade what type of structure, now?

A. The average structure in the lay-out plan. Not a pipe [935] line structure, but delivery.

Q. No, the average lay-out structure; one man?

A. Two men.

Q. Two men; and those men would be under the fine grader's direction, or somebody's direction, so it would be unskilled labor, would it not?

A. Yes.

Q. Was there at any time while you were on the job that any statement was furnished you by any of the Concrete Construction Company men of any claimed time lost because of your fine grading operations?

A. No, there was never a statement given to me.

Mr. Holman: That's all.

(Testimony of James A. Black.)

Cross-Examination

By Mr. Hawkins:

Q. You are an engineer, are you not, Mr. Black?

A. Well, in a fashion, yes.

Q. How long have you been engaged in this kind of work?

A. You mean this particular type of work?

Q. Yes.

A. I believe on fine grading I started in March, 1944.

Q. For Sam Macri?

A. No, for H. H. Walker, Inc.

Q. H. H. Walker, Inc., and then later you were employed by Macri, is that right?

A. Yes. [936]

Q. And at the present time you are employed by Walker? A. Yes.

Q. And do you do that same type of work now, or not?

A. No; I have charge of sagging the wire.

Q. Charge of what?

A. Getting the wire up to the right kind of tension.

Q. I see. Mr. Black, in these excavations, in performing these excavations, you of course followed the plans and specifications, did you not?

A. I did.

Q. You had those plans and specifications in your possession? A. Yes.

(Testimony of James A. Black.)

Q. Did at any time Mr. Schaefer or any of his employees, these employees of the Concrete Construction Company, ever complain to you that your walls were vertical when they should have been a slope?

A. Yes, they complained about them being vertical.

Q. And what did you say with respect to that?

A. Really, I don't believe I said anything.

Q. Now, then, you did your fine grading on these concrete inlets, outlets, and syphon vents and drains, did you not, on the job?

A. On 1062?

Q. On 1062.

A. These turbine turn-outs I did. [937]

Q. With reference to drawing 33-d 2598, which is part of—what exhibit is this, counsel?

Mr. Holman: That's my copy you're using there, isn't it?

Mr. Hawkins: Yes.

The Clerk: Is that 1062?

Mr. Hawkins: Yes.

The Clerk: Plaintiff's 3.

Q. (By Mr. Hawkins): Now, calling your attention to that particular drawing I just mentioned, Section EE, what slope does that call for, sir?

A. One to one slope or steeper.

Q. One to one or steeper?

Mr. Olson: I'm going to object to this as not being proper cross-examination.

(Testimony of James A. Black.)

Mr. Hawkins: Well, I'll withdraw this line of examination, with the understanding this witness will remain. I assumed like the others you wanted him excused.

Mr. Olson: I have no objection to their using Mr. Black for whatever they wish, your Honor. As a matter of fact, I would like to see him accommodated, but I want them to make him their witness.

The Court: It doesn't seem to me it is proper cross-examination. It goes beyond the scope.

Mr. Hawkins: Well, I understood counsel went into [938] the vertical bank. I may be mistaken. If he did, I'd be entitled to interrogate him as to the slope which he thinks the specifications call for.

Mr. Olson: He did testify, your Honor, that the banks were vertical.

Mr. Hawkins: I think I'm entitled to go into that subject. This relates to it, why he did it.

The Court: Well, all right, go ahead. I'll overrule the objection.

### Cross-Examination

(Continued)

By Mr. Hawkins:

Q. What bank or slope does that call for?

A. That calls for one to one or steeper. This particular check here is a neat sub-grade.

The Court: What were you referring to, Mr. Hawkins?

Mr. Hawkins: I was referring to drawing 33, attached to the exhibit in question. It was 33-D 2598, that is drawing number 33.

(Testimony of James A. Black.)

The Court: Yes; well, there are about, on my page here, drawing 33 shows at least a dozen different drawings.

Mr. Hawkins: Yes; it is section EE, your Honor.

The Court: All right.

Mr. Hawkins: And that was the section I particularly called his attention to, but you'll notice the [939] same thing with reference to section AA or CC, one to one or steeper.

Mr. Olson: Is that a structure excavation, counsel?

Mr. Hawkins: That is a structure excavation.

### Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, Mr. Black, did your men ever get in the way of Mr. Darcy's crew?

A. Oh, I imagine that at times you might call it in the way, when we had to go back and do a little extra work on the structure. When I fine graded the structures I didn't dig any cut-off walls, and we had to go back and do those.

Q. Why didn't you do those before?

A. Because of the fact that in putting up forms you would walk around the narrow trench and break off the sides of it.

Q. In other words, when you put in one of those structures it is desirable to get in there with a shovel just as the form is being set down; otherwise dirt will get underneath it?      A. Yes.

(Testimony of James A. Black.)

Q. And if you'd dug these cut-off walls prior to that time you would have had to go back to them anyway?      A. Yes.

Mr. Hawkins: That's all.

Mr. Ivy: No questions. [940]

Mr. Holman: On this last question, Mr. Black, what was the practice with respect to covering any shallow structures that might be made? Did you put any boards or anything over them to protect them when you fine graded?      A. No.

The Court: Any redirect?

Mr. Olson: Yes.

### Redirect Examination

By Mr. Olson:

Q. Mr. Black, counsel interrogated you if you could remember any specific instance of delaying the carpenters, and you related one instance, I believe, on which you held them up two and a half days, and then asked if you remembered the identity of any other structures as to where the delay was, and you said no. I'll now ask you, were there, even though you can't remember the identity or the specific number of the structures or location of them, were there other occasions where the carpenters were delayed by reason of the fine grading not being finished?

Mr. Holman: I submit that's calling for a conclusion of the witness, when he says he can't remember any of the structures.



(Testimony of James A. Black.)

The Court: He said he couldn't identify them by number, as I recall. [941]

Mr. Holman: And counsel is asking a general question.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I object to that as improper redirect, your Honor.

The Court: Overruled.

Witness: Yes, there was.

Q. And how frequently would that occur, Mr. Black?

A. Oh, that's pretty hard to say.

Mr. Hawkins: I didn't hear what you said.

The Court: Hard to say, is that what you said?

A. Yes, that would be pretty hard to say. There would be times when I'd be asked to go back a couple of times a day, and then I might go for a week without being asked to go back and work on a structure. That's too long ago, I can't remember just off-hand now.

Q. You remember the delay existing, but as to the frequency of it, per week, you're unable to give us that information, is that right?

A. No, I can't, now.

Q. Now, you said it would take one and a half days on the average to fine grade the average layout plan structure, assuming you had two men working on that structure? [942]

A. Yes.

(Testimony of James A. Black.)

Q. Is that while the ground was frozen, or unfrozen?

A. No, that would be while the ground was unfrozen.

Q. And would it take a longer or shorter time while the ground was frozen?

A. Oh, it would take longer.

Q. And there were times, you say, when you had a crew of one man to fine grade for you?

A. From one on up.

Q. And sometimes five; and you may have answered this; what was the full crew of fine graders that you should have had?

A. Ordinarily——

Mr. Holman: Well, just a minute. I object to counsel's question, the full crew he should have had. There's an inference there is a compulsion of a certain sized crew. I'll submit it is not proper redirect.

The Court: Yes, I'll sustain the objection.

Q. In order to complete the fine grading and keep ahead of Mr. Schaefer's carpenters on this project, what size crew would it take, Mr. Black, to complete your fine grading?

Mr. Holman: I object to that as based upon speculation, your Honor. It requires a great many elements in order for the witness to answer as a hypothetical [943] question. It has to be hypothetical, until the various steps are——

The Court: Well, I'll sustain the objection. There are a good many unknown quantities there.

(Testimony of James A. Black.)

Mr. Olson: That's all. Excuse me——

The Court: Are you through?

Mr. Olson: Yes, your Honor. I didn't have available to me this drawing 23 because my specifications were in evidence, and I've been looking for this notice on here where it said, according to counsel, "one to one or steeper." I would like to—I assume that counsel is attempting to show that the specifications call for a different slope. Would you show me that?

Mr. Hawkins: That was drawing 33.

Mr. Olson: Well, I have what I think is drawing 33 here, but I don't find it.

Mr. Hawkins: This was on the contract I'm speaking of. You're on the specifications.

The Court: You used a document not in evidence, then, Mr. Hawkins?

Mr. Hawkins: No, it was Exhibit 3.

The Court: Well, that's Exhibit 3.

Mr. Olson: I understood it was EE of drawing 33. I'm unable to find that.

Mr. Hawkins: Apparently there is some difference [944] between the two that I examined. If so, I apologize to the Court.

The Court: I know it was inadvertent, of course. I think the record should show that the witness in giving that testimony was not referring to or did not have before him plaintiff's identification 3.

Mr. Hawkins: Perhaps overnight I can find the explanation for that.

(Testimony of James A. Black.)

Mr. Olson: In the meantime, I move that the testimony be stricken from the record on the ground it is not the best evidence, and that the specifications speak for themselves.

The Court: I think it should be stricken, and that counsel should have an opportunity—just a minute.

Mr. Olson: If you're referring to that, that's not a structure excavation at all.

Mr. Hawkins: Well, that's not what I was referring to, but it shows excavation one to one.

Mr. Olson: There was excavations that was vertical; I admit that there are, on Exhibit 25 or 23, some excavations vertical on the neat lines, but if there is any reference to drawings that refer to an outside bank one to one or steeper, I'd like to see it.

Mr. Hawkins: Your Honor, drawing number 26 attached to specifications 1062, being plaintiff's [945] Exhibit 3, shows under section AA, that is a portion of the drawings appearing on there, a cut of one to one or steeper.

The Court: What drawing number is that?

Mr. Hawkins: 26. Now, that is not the drawing that I referred the witness to, however.

The Court: Well, I think we should strike what he testified to before, and then you'll have an opportunity to call his attention to one of these drawings that's in plaintiff's Exhibit 3 in the morning, if you care to. Counsel and the witnesses in this case will be excused. I have another matter to take up before adjournment. We'll reconvene in this case tomorrow morning at 10 o'clock.

(Testimony of James A. Black.)

Mr. Holman: Your Honor, we were talking among ourselves and wondering whether it might be, instead of taking half days, the other case would intercede for its conclusion, and then we could come back, instead of having to spend half days. There is a lot of expense here. I would at least like your Honor to consider that.

The Court: Well, I'll consider that; however, I understand from Mr. Olson, or I take it from Mr. Olson's expression here, that he doesn't wish to agree to that.

Mr. Olson: No, your Honor.

The Court: What I'm trying to do is to expedite [946] both cases as much as possible, and make a fair arrangement or adjustment. The other people have witnesses from a very long distance here, and I just want to give them an opportunity to get rid of some of them, but I'll consider that.

Mr. Holman: It would be very much appreciated.

Mr. Olson: Speaking on Mr. Black's behalf, he would like to know whether he's free to go home or not.

The Court: Well, we haven't concluded with him. I was in hopes that could be done.

Mr. Olson: Was that a matter you wanted to go into with Mr. Black? Do you want Mr. Black?

Mr. Holman: He's subpoenaed as a defense witness. Naturally I want him.

The Court: He's subpoenaed as a defense witness, and will remain here anyway.



(Whereupon, the Court took a recess in this cause until Tuesday, March 4, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, March 4, 1947  
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Hawkins: May I address the Court, please?

The Court: Yes. [947]

Mr. Hawkins: With reference to this confusion that existed yesterday with respect to drawing number 33, I find that in interrogating the witness I referred to drawing 33 attached to specifications 1068. The identical drawing, however, appears as drawing number 24 on specifications 1062. It is identical in every respect. It is dated the same date, Denver, Colorado, August 25, 1942, and bears the same serial number that I read into the record at that time, 33-D-2598.

The Court: Well, I have been looking at this drawing, and it is difficult for me to make out what it is, because I'm not an engineer, but it seems to me that it refers to a syphon filling concrete structure, and that the slope referred to, one to one or steeper, does not refer to any graded side wall that the witness referred to on direct.

Mr. Hawkins: The witness testified that slope represented a neat concrete line. I think you will find that is a weir wall, that is, it cuts against the channel of the water, and the one to one referred



to is the line to which the concrete must go in order to stop the flow of the water. Now, then, the structure, if it is an excavation of slope of one to one, then the weir wall must extend out to a slope of one to one in order to stop the flow. If in fact the structure is less than one to one, [948] or is perpendicular, then the slope of that weir wall must conform to that structure. In other words, it illustrates my point that the drawing shows that the specifications do not specifically call for a one to one slope in the excavation; it may be steeper.

The Court: This witness wasn't called as an expert. He's simply testifying, as I understand it, as a workman here. He did say he was an engineer.

Mr. Hawkins: I asked him if he was an engineer. He said yes.

The Court: He wasn't called or didn't testify on direct as an expert; he simply testified what his observation was, that the excavations were vertical. It seems to me that in order for this testimony to be of any value in the record, it would first have to be shown that he knows what these drawings are, and that he could interpret them as an expert. He said he was an engineer. I don't know what that means. There are all sorts of engineers.

Mr. Hawkins: He did testify, however, that he had the specifications on the job and followed them on the work there, and having used them, I think he's entitled to testify from that experience.

Mr. Olson: Do you contend, counsel, that that drawing you refer to was used by anybody on this project, [949] or was referred to?

Mr. Hawkins: I don't think that question is properly directed to me.

Mr. Olson: There's been no testimony introduced on it, your Honor.

Mr. Hawkins: All I know about this case is what I've seen here in Court, and I have made some attempt to analyze these specifications, and I'm trying to give the Court whatever benefit can be derived from that analysis that I've made. The witness has testified that was a one to one or steeper slope, that it was a neat concrete line. He did not say it was an excavation slope at all; he was very careful to do that.

The Court: His testimony would be valuess to me and I think any appellate court unless he knows what this drawing is, what it represents, and what its relationship may be to the work he did.

Mr. Hawkins: I can interrogate him further.

Mr. Olson: Counsel is making him his own witness, I presume, because I didn't interrogate with reference to those specifications. I interrogated as to the slope of the walls as actually excavated. If this is his witness, I understand this witness has some twenty men being held up, if they can accommodate him by putting his testimony in, I have no objection. [950]

Mr. Holman: In that connection, this witness called me last night by 'phone, said he was out of money, had not been paid, and that he was having the utmost difficulty paying his hotel bill. I told Mr. Black while he was on the stand I could not discuss this with him, I planned on going over his

work last night, and that he was not off the stand, and I was compelled not to talk to him about it. I would suggest before you make any such statement as that you might take care of his hotel bill.

The Court: Well, I assume if he's subpoenaed by one party and used by another, there would be some adjustment made in paying his expenses here.

Mr. Holman: We have subpoenaed Mr. Black and paid the regular mileage from Cheney here and one day's witness fees and one day's subsistence, in the amount of \$26.00, is that correct?

Mr. Black: That's right.

Mr. Holman: I don't like to be charged with plaintiff's delinquency, and in addition get a hurry-up call for payment of money.

The Court: When did you subpoena him to appear, Mr. Holman?

Mr. Holman: On the 25th, I believe. It is in the file here. [951]

The Court: On the first day of the trial?

Mr. Holman: No, the second day.

The Court: Has he been held here since that time on the request of the plaintiff?

Mr. Holman: I understood so, your Honor.

The Court: I'm just trying to—I think some adjustment should be worked out.

Mr. Holman: He's been reported as a plaintiff's witness.

The Court: If the plaintiff gets through with him and you wish to keep him, then I think the burden should shift to you.

Mr. Holman: That's correct.

Mr. Olson: Do you contend that you released Mr. Black at any time since he was subpoenaed?

Mr. Holman: I just decline to be interrogated by counsel unless I am on the stand.

Mr. Olson: I did, your Honor, last Friday, hand Mr. Black a subpoena to be here yesterday morning, but outside of that I had nothing to do with Mr. Black being here last week.

The Court: I don't know that there is any question before the Court now as to the payment of this witness' expenses, but I think the party who subpoenaed him would be responsible until they got through, until [952] the other party subpoenaed him, and then they would be responsible until they got through. That's my idea on it. I'll permit you to interrogate him on this. The objection will be over-ruled. Do you have the right book now?

Mr. Hawkins: I have 1062, yes.

The Court: I don't believe you have. Isn't that 1068?

Mr. Hawkins: This is a copy of it.

The Court: Oh, yes. I just wanted to be sure you had the right copy.

Mr. Hawkins: I thought possibly your Honor might want to follow.

## JAMES A. BLACK

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

## Recross-Examination

By Mr. Hawkins:

Q. Referring to drawing number 24 of specification 1062, do you know what those drawings represent, Mr. Black?

A. Well, they're pipe inlets or outlets. That's a structure where a pipe takes water across the road or into a ditch and delivers it into another structure. They also at times have weirs on them, and on other times they don't, and also part of the structure shows the structure delivery into the ditch, or delivery to a farm.

Q. Now, can you tell the Court what a weir wall is? [953]

A. A weir wall is just a plain wall set in a ditch, at the end of a ditch, usually, for delivery of water to a farm, a weir wall of various sizes to measure water to a certain tract of ground.

Q. Yes, and the weir wall shown in, for instance, section EE is perpendicular to the flow of water, is it, that is, it cuts across? A. Yes.

Q. And that slope marked one to one or steeper would show the slope of the ground on which the concrete rests, is that right?

A. That's right.

Q. And must the weir wall extend out to the ground? A. What?



(Testimony of James A. Black.)

Q. I say, must the weir wall extend out to the ground on either side? A. Yes.

Q. Why?

A. Well, to keep the water from washing in underneath it, or washing out the weir wall.

Q. If your excavation for the structure is vertical rather than a one to one slope, what would you have to say about the slope of the weir wall at the ends?

A. Well, it would have to be compacted to your one to one or steeper slope. However, these weir walls were never [954] put in out on any of the work I was ever on. They were always vertical end, rather than a one to one slope.

Q. It was a vertical end? A. Yes.

Q. And the wall just ran to the vertical line?

A. That's right.

Q. And where the drawing says one to one or steeper, I take it that was the situation contemplated? A. Yes.

Mr. Hawkins: I think that's all.

#### Recross-Examination

By Mr. Holman:

Q. Mr. Black, the concrete was poured to the vertical slope you just answered counsel about, and the work accepted that way?

A. That's right.

Q. Yesterday you answered counsel Hawkins, according to my note, that there were other occasions—I believe counsel Olson—there were other



(Testimony of James A. Black.)

occasions where carpenters were held up, there would be times when you were asked to go back a couple of times a day, and there might be a week before going back. Do you remember that testimony, sometimes you were ahead and couldn't go back?       A. Yes.

Q. Now, the thing I'd like to know with respect to that, Mr. Black, if in any instance there was a statement furnished [955] to you of claimed loss of time by your not getting back there earlier to fine grade?       A. No.

Q. Nothing ever given to you to forward to Macri, in writing?       A. No, sir.

Mr. Holman: That's all, your Honor.

### Redirect Examination

By Mr. Olson:

Q. Mr. Black, referring to the drawing number 24 of specifications 1062, were any such excavations or any of that type of drawing used any place on project 1062?

A. Not on any of the work I was connected with.

Q. Now, does the drawing as indicated there, as shown, a one to one or steeper—what part of the concrete slab does that refer to?

A. That refers to the head wall.

Q. Pardon?       A. Head wall.

Q. Yes, but what portion of it would rest on that line there marked one to one or steeper?

A. Well, that would be, this weir wall is in most instances eight inches wide, and just the bottom and this one to one slope would rest on the ground.

(Testimony of James A. Black.)

Q. It is the bottom of it, then?

A. That's right.

Q. Is there any form that goes against that?

A. Just against the sides.

Q. Would it be possible for you, Mr. Black, by adverting to these model excavations, to illustrate that drawing in any way?

A. Well, this is an entirely different type from what you have over there. This is just a plain wall; there's no box or anything attached to it.

Q. Just a plain wall? A. Yes.

Q. And that cut represents the underneath or the bottom part of the wall? A. That's right.

Q. Instead of coming over and squaring up, that could come over and slant up? A. Yes.

The Court: Am I correct in assuming that that concrete would be poured against the excavation, without any outside form?

A. No, there would be an outside form on the ends and sides.

The Court: Where it says "one to one or steeper," that's a cross section there?

A. Yes.

The Court: Where it says "one to one or steeper" under that line, would there be a form under there? A. No. [957]

The Court: Or it rests against the dirt?

A. Just dirt.

Q. Do you know what these typical drawings are, attached to these specifications, Mr. Black?

A. Yes.

(Testimony of James A. Black.)

Q. And what are they?

A. Well, they show the various typical designs of different types of structures used by the Bureau of Reclamation service, and they are not, the structures themselves are not taken from that book; they're taken from the structure book.

Q. Lay-out plan?

A. Those are typical drawings.

Q. Necessarily relating to this project, or what are they?

Mr. Holman: Just a minute. Your Honor, I submit the witness is not qualified to answer that.

The Court: Well, I think I'll sustain the objection. It's leading, at any rate.

Mr. Olson: That's all.

Mr. Holman: May I amplify this just a little with the witness, your Honor?

The Court: All right.

Mr. Holman: I have another copy of 1062; may I use it?

The Court: All right. [958]

### Recross-Examination

By Mr. Holman:

Q. Referring to drawing 24 in specifications 1062, for section AA at the bottom left hand column, now, the top of that, which is marked "plane" is looking down on that structure, isn't it?

A. That's right.

(Testimony of James A. Black.)

Q. And the longitudinal section next below that is what, is that a cross-section?

A. No, that's not absolutely a cross-section.

Q. How do you look to get the cross-section?

A. Well, you'd be looking from the side.

Q. Then the pipe inlet structure with check, section AA, is still a reference to the plan on the top, isn't it?

A. Yes, that's a reference to the top.

Q. Then the section AA would be what part of the plan on the top?      A. This part right here.

Q. Yes; now, when you say "this part" that is the long wall on that drawing?      A. Yes.

Q. I didn't know whether that was clarified, your Honor; and that would hold so for each of these other structures?

A. Yes, these are just a little different type structures, inlets and so forth.

Mr. Olson: And what part—were you through, Mr. [959] Holman?

Mr. Holman: Well, I think I am. I just wanted to get that clear.

Mr. Olson: And what part of that long wall, the top side or the bottom side?

A. The way we're looking at that, it's the top side.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: I'd like to ask one additional question.

(Testimony of James A. Black.)

### Recross-Examination

By Mr. Holman:

Q. Was there at any time any place on your work where there was a definite specification such as this, that you didn't comply with it? In other words, if the government has specified a certain slope you followed it, did you not? A. Yes.

The Court: Any further questions?

Mr. Olson: Well, in view of that last question, your Honor—well, I'll ask that the answer to the question be stricken, your Honor, as not proper cross-examination, and calling for the conclusion of the witness. I think he can testify what he did. That last question's going to open up a whole phase of the examination again. In other words, he's testified that the [960] walls or the banks were excavated vertical; now counsel is saying if they call for a one to one slope he excavated that way.

The Court: I understood the question to mean where there was a specific slope designated on a drawing of some kind, whether he followed that. That's the question, wasn't it?

Mr. Holman: That's the question.

The Court: I'll deny the motion.

### Redirect Examination

By Mr. Olson:

Q. Do you recall of any excavations, then, Mr. Black, where the drawings or specifications specifically called for any slope as shown on this drawing that's been shown to you? A. Not on 1062.

Mr. Olson: That's all.

(Testimony of James A. Black.)

Recross-Examination

By Mr. Holman:

Q. That is, not on 1062 with respect to structures?      A. Yes.

The Court: Are you through with this witness now? Any further questions?

Mr. Holman: No.

The Court: Are you through with the witness?

Mr. Olson: Yes.

The Court: Then if he is to stay, he's your [961] witness.

Mr. Holman: Correct, your Honor, and at the very earliest opportunity I will excuse him.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: We would be glad to pay Mr. Black's expenses for yesterday. I hesitate very much to do it with one of Mr. Holman's witnesses.

The Court: I thought perhaps you gentlemen could get together on division of expenses. If you can't, upon proper application the Court will decide it.

Mr. Olson: I don't think there's any controversy.

The Court: All right, call the next witness, then.



## ROBERT MONRAD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Robert Monrad.

Q. Where do you live?           A. Yakima.

Q. Washington?           A. Yes.

Q. Have you been in attendance since the beginning of this trial, at my request?

A. Yes, I have. [962]

Q. Now, were you employed on the job 1062 at the Roza project?           A. Yes, I was, sir.

Q. And when did you first go to work on that job?

A. Well, I don't remember dates, but I started in with Macri and I think I worked for him two weeks, and then when they took over, Schaefer took over the job, I switched over to him.

Q. You were on the job when Schaefer took over, then?           A. Yes.

Q. And did you stay—how long did you stay on the job 1062?

A. I stayed on the job 'till they finished pouring the concrete in '45, 1945.

Q. You were on it 'till they finished pouring concrete?           A. Yes.

Q. Did you work any on 1068?

A. I worked two days for Macri on 1068.

(Testimony of Robert Monrad.)

Q. Well, were you discharged then?

A. No, I wasn't discharged. I got lost in the field both them days, and they chased around there, I couldn't find them, they would pour one structure and then they would head off into the country and I couldn't find them, they never told me or anything, so I went to Yakima and stayed there.

Q. Well, now, on 1062, then, Mr. Monrad, what was your duties or job on 1062? [963]

A. Well, I first started as a form bender.

Q. As a what?

A. A form bender, or a carpenter, whatever you want to call it, and I went out in the field once and started to set some forms in the excavations, and I believe I helped set about eight structures. The first one we started on was a little intake for to syphon the water under the road, that's a small structure, and the first thing I had to do, John Klugg was with me, he was my boss—

Mr. Holman: Who, please?

A. John Klugg.

The Court: Does this refer to the time he was working for Mr. Macri?

A. No. The first thing we had to do was to grab a pick and shovel and we shoveled dirt there for two hours to get the structure down to where it belonged. We went from there to the next structure, which had three structures in it, in that station, and we started to set our forms in there, and we put in the head panel and one outlet, and when we come to the other outlet on the other side of

(Testimony of Robert Monrad.)

the structure, why, there was a hole dug there under that outlet four and a half foot deep, and it should have been about six inches deep, so we couldn't do any more there, and we had to quit; and we went across the road into the next hole. I dug about nine and a half inches to dig out before it [964] would conform with the engineers' points, so that's all the forms we could do that day, and I just helped one other day out in the field, as they wanted me.

Q. What was your experience on that day?

A. Well, that structure was setting on top of the ground, with, oh, about eight or ten inches of dirt on one side, and the rest we had to fill in, and there was an offset about the middle, between two structures, a drop of about three inches. Now, that wasn't done with any drop. We had to make that three inch drop between the two structures.

Q. That was a three inch difference in elevation?

A. Yes.

Q. And you say the carpenters had to do that?

A. Yes, we done that, the boys I worked with and myself.

Mr. Holman: I object to counsel's last question as leading and not supported by the witness' statement. He didn't say the carpenters had to do it; he said "we had to do it."

The Court: Well, it was leading, but I'll let it stand now.

Q. Now, did you do any of the panel making?

A. What?

(Testimony of Robert Monrad.)

Q. Did you make up any panels at the beginning of the job, Mr. Monrad? [965]

A. Yes, I done quite a few of them. I think I was in the yard 'till we had 72 structures made.

Q. And can you describe the lumber as to quality and adaptability to this job?

A. Well, the first lumber we had there looked pretty good, but it must have come right out of the mill pond, because when I drove nails into the board, I get wet; all of it was wet, like it was raining.

Mr. Holman: May I have that answer?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: I move that portion with respect to coming out of the mill pond, your Honor, be stricken as a conclusion of the witness.

The Court: Well, that is stricken. The part that it was wet and when he hit it it sprayed on him will stand.

Q. Can you describe the lumber in any other particular, or does that describe it?

A. Some other lumber?

Q. I say, how was the lumber otherwise, other than being wet?

A. Well, that particular pile was pretty fair lumber.

Q. All right, and did you have opportunity to observe any other supply of lumber brought on the job later on?

(Testimony of Robert Monrad.)

A. Yes, they brought in lumber two or three times after that [966] when I was in the yard, and that was poor lumber, all of it.

Q. And what was the matter with it, Mr. Monrad?

A. Well, it's full of knots, and it was warped, and the two by fours was crooked.

Q. Now, you're speaking, are you, of lumber that was delivered to the yard while you worked in the yard? A. Yes.

Q. And you were in the yard, as I understand it, from what you said, building 72—panels for 72 structures, did I get that right? A. Yes.

Q. Then after that, Mr. Monrad, what did you do on the job?

A. I done the finishing, cement finishing.

Q. Cement finishing? A. Yes.

Q. When did you start doing that work with reference to when they started to pour structures? Did you start at the beginning of the concrete pouring, or not? A. Yes, I did.

Q. And what does the cement finishing consist of? What was your operation?

A. Well, the forms is set to a certain grade, and the cement finisher, when they finish pouring, it is high or low, or whatever it is, and he takes a wooden float and smooths [967] it down to the edge of the form, to get it even, and then takes a steel trowel and smooths it over.

Q. Did you have anything to do with the hole that was left in the concrete by this she-bolt?



(Testimony of Robert Monrad.)

A. Yes, when we stripped the form off I had to plug all them she-bolt holes, and also what we call "sack" the concrete on the outside down to where the dirt comes, or rather, a foot or foot and a half, something like that, on the structures, and on the inside boxes. I sacked all of it.

Q. You say "sack?" A. Yes.

Q. What is that?

A. You take a thin grout and put it on the structure with a brush, and then take a sack and rub it so to fill up all the holes in the structure, lots of little air pockets that have to be filled, and we rub that in.

Q. That is part of your finishing operation?

A. Yes.

Q. All right; now, in order to fill the hole left by the she-bolt in the concrete, just explain to the Court what you'd do to fill up that hole; in other words, what part of the structure you had to work on to do it.

A. Well, I had to be on both sides of the structure. When we stripped the form off I had to be on the outside and [968] drive some of that dry mud in from the outside, and then get on the inside and fill it from the other side, so it would be tight, but there was lots of places the dirt was so close to the structure I couldn't get in there without digging, or else I'd be standing on my head, kind of, to get it in there, that is, hanging over to get it in there.



(Testimony of Robert Monrad.)

Q. Now, did you have an opportunity to and did you observe, after you were on the cement finishing job, any of the carpenters doing any of the structure placing in the structures, in the excavations?

A. Yes, I seen lots of it.

Q. Did you observe whether or not they did any digging before they started putting in their panels?

A. Yes, I've seen them digging.

Q. Would you be able to tell us how long, or would you know about that?

A. Well, no, I couldn't say that.

Q. How frequent an occurrence was it that the carpenters did digging?

A. Well, any time I saw them start on the structures they were digging; before they could get started they had to dig.

Q. Every time you saw them start they had to dig?      A. Yes.

Q. Now, if you were on the concrete finishing, as I understand [969] it, which would be ordinarily behind the carpenters——      A. Yes.

Q. ——how would you see the carpenters up ahead of you?

A. Well, we was close to them; we was pretty close to them, so I could see them working.

Q. And would you tell the Court whether or not the concrete pouring operation was a continuous operation from day to day, or whether you were held up or interrupted?

A. No, we'd run maybe two or three days and then there was a lay-off; we'd lay off from three to five days.

(Testimony of Robert Monrad.)

Q. And why would that be, Mr. Monrad?

A. Well, that was because they didn't have any excavations ready so the carpenters could keep away from us.

Q. Mr. Monrad, did you help do any form removing or any stripping?           A. Yes.

Q. And how come you were doing that?

A. Well, we'd come to a structure, and I couldn't do any finishing, that is, on that sacking, until we had the forms off, or plug up the holes. We had to have the forms off first, so I helped the boys to strip the forms and then I started my work finishing.

Q. Well, now, go ahead and tell about the form removing and stripping operations; how easy it was, or what difficulties [970] you had, or just what you run into.

A. Well, most of the places was too tight, so we couldn't get the forms out, without either digging or getting some prys and raising the form out that way, and that would break the form.

Q. And how often would that occur that the forms would be damaged in any amount?

A. Well, pretty near all of them was too narrow in one place or another. You would have lots of room on one side and the other side would be right against the strong-backs.

Q. Well, now, were the forms then, after being removed, in suitable condition to be re-used in the next structure without being repaired?

A. You had to repair them. They had to send them back in the yard and have them fixed up.

(Testimony of Robert Monrad.)

Q. Describe, Mr. Monrad, the excavations with reference to the slope, if any, to the bank.

A. They were vertical. There was no slope to it.

Q. And describe the clearance, if any, from your concrete itself, the panels, to the bank, that is, what was the distance between it.

A. From the concrete to the bank?

Q. Yes, and also from your panel, outside panel, to the bank.

A. Well, there was no room from the strong-back to the bank; [971] they were right up against each other, and then when they got the form out of there, that would leave about seven and a quarter inches from the concrete out to the bank.

Q. Did you work on each one of these concrete structures, Mr. Monrad?      A. Yes, I did.

Q. And is that testimony that you've just given, is that typical of each of the structures?

A. That's what it is.

Mr. Olson: You may examine.

#### Cross-Examination

By Mr. Holman:

Q. Mr. Monrad, had you been on other work in the Roza project before you started working for the Macri Company?

A. Yes, I worked from the Roza, then down the line.

Q. Yes, sir. Now, had you had experience on other projects with respect to making structures?

A. Outside of the Roza?

(Testimony of Robert Monrad.)

Q. Yes, in the Roza.

A. I had experience in the Roza in the same kind of work as we done there.

Q. Yes, sir, and in the Roza, on all of your experience, the banks were cut generally perpendicular, were they not?

Mr. Olson: That's objected to, your Honor, as being immaterial. It's what the specifications called for in this case. [972]

Mr. Holman: This man was a worker with respect to the excavations.

The Court: Well, I suppose this question will come up some time here, that it will be contended that it is proper to show what was customary.

Mr. Holman: What was acceptable to the government, your Honor; our position is that the test is under the specification, I can't recall the number right now, that we have read, 47, that the requirement is excavation to the satisfaction of the engineering officer in charge. That's the sole purpose, and we urge that your Honor, in view of the fact that the sub-contract in evidence provides that all the work of the sub-contractor shall be done to the satisfaction of the principal contractor, and that it shall be done to the satisfaction of the contractor.

The Court: Is it your contention that the requirement of excavation is definitely fixed by this sub-contract and main contract, Mr. Olson?

Mr. Olson: Yes, your Honor, as between the sub-contractor and the main contractor Macri. He handed us the specifications to submit a bid. We

(Testimony of Robert Monrad.)

read them over, as we would have to do, and they provide what Mr. Maceri was to be paid for on his excavation. We had a right to assume that he was going to do that which he was to be [973] paid for, unless the sub-contract specified something different.

The Court: Well, I think that might be well contended as to the amount of excavation that was done so far as yardage was concerned, but the thing that bothers me here, and I would welcome any expression from either side about it, apparently there is no definite direction or specification, at least none that has been called to my attention, that requires these side walls where the concrete isn't to be poured right against the dirt, there isn't any requirement that the slope be to a one to one slope, except the provision in here that's been directed to the Court's attention that payment shall be made on the basis of one foot out from the base, and a slope of one to one. Doesn't that simply indicate the maximum that the Bureau will pay for in the way of yardage, and as a method of measuring yardage, and doesn't mean that each bank has to be cut necessarily on that slope? I don't know whether I make myself clear or not. For instance, if Maceri made an excavation around the concrete, where it is necessary to make the side-walls, and took out a yardage equivalent to one to one, wouldn't that be compliance, even though the walls might be vertical? Now that's the thought that occurred to me from reading the specifications.



(Testimony of Robert Monrad.)

Mr. Olson: Well, your Honor, our position on this is that the Bureau of Reclamation in fixing up these specifications and saying what they would pay for, obviously were going to pay for only so much excavation as was necessary to be made in order to install the forms, remove them, and put in the structures. They're going to pay for that, and not pay for more excavation than was necessary, therefore that the Bureau of Reclamation in fixing that form of payment, that the necessary implication is in there that that is what's reasonably required for clearance, and to prevent sloughing, to enable the contractor to install these forms. Now, the fact that on some other project, the same contractor is doing the excavating and is also doing the concrete structure placing, he may figure that he can save a little money on his excavation, even though it is going to cost him some more money to put in his forms, and if he wants to do that, the Bureau of Reclamation don't care.

The Court: Did you have something to say, Mr. Hawkins?

Mr. Hawkins: Yes, I just had this thought in mind. The Bureau, of course, has laid down these specifications after a good many years of experience, and undoubtedly in the past contractors have excavated, four, five, six feet away from the structure, and have gone to the Bureau [975] contending it was necessary to excavate that far, and demanded for it. I take it just for the very purpose of avoiding that situation they put this paragraph



(Testimony of Robert Monrad.)

47 in, namely, that regardless, whatever excavation was necessary, the contractor was not going to get paid for more than the slope indicated. That doesn't mean it has to be at that slope, or that it would be greater or less. That relates solely to the mode of payment. The soil condition out in this area apparently varies from spot to spot. I've been over some of it myself, not in connection with this case, in other years, and I have always thought it was a rather sandy soil, and that any excavation made would necessarily tend to fill in, that it would just naturally have a 45 degree slope, but apparently the testimony is that is soil is such that a perpendicular wall can be maintained. Now, if that is the fact, of course that is all that is necessary to put in the structure. These exhibits might indicate you have an excavation fifty feet deep, but the average is only four or five feet deep. That's a proposition where you can almost reach to the bottom lying on the top. Some of the structures are large, of course, but they're relatively few. I think the proper test, as counsel has suggested, that an excavation required, is one that is suitable for the structure, and the testimony of this [976] witness as to what other contractors found suitable under similar conditions would be pertinent.

Mr. Holman: Your Honor, I would respectfully direct your Honor's attention to the sub-contract which is in evidence, and the very first part of it, after designating the project as Roza Division, Yakima Project, Washington, there is then this wording:

(Testimony of Robert Monrad.)

(Whereupon, counsel read Article I, a portion of Article II, Article III, of plaintiff's Exhibit 5, and paragraph 47 on page 22 of plaintiff's Exhibit 3.)

Mr. Holman: With that, I am asking this witness, who was on this job both for Macri and for Mr. Schaefer, as to excavations in that area, coupled with the fact, your Honor, that Mr. Schaefer has already answered that he made an inspection in the field before the contract was signed, and had investigated the specifications.

The Court: Well, assuming all that is required here is a reasonable excavation on Mr. Macri's part, it seems to me that this would be allowing too wide a latitude, to let a witness testify as to what was done on some other section of this Roza Project. In order for it to have any probative value as what was reasonable and customary, it seems to me you would have to show a similarity of conditions, and there wouldn't be a similarity of conditions if there were no sub-contract, [977] or if the sub-contract didn't have the same terms as this, so I'll sustain the objection to the question that was asked of this witness.

Mr. Holman: Your Honor, it is our position that if Mr. Schaefer wanted a one to one slope he could have provided specifically for a one to one slope in his sub-contract, then Mr. Macri could or could not have accepted it, but he has made no such provision,

(Testimony of Robert Monrad.)

and therefore general usage in a workmanlike manner, that's what it says, would be pertinent; that's what I had in mind.

The Court: Well, I don't think your general usage would be shown unless you could show a similarity of conditions. If Mr. Macri was doing his own work it doesn't make any difference how he does it, if he had no sub-contract on the other work, or if the conditions were different. I don't think I should go that far afield at this stage of the case. I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Monrad, you told counsel of having encountered an excavation that was dug four and a half feet deep when it should have been only, I think you said, six inches deep? A. Yes. [978]

Q. Now, did you go out there solely to inspect that for Mr. Schaefer, at that time? A. No.

Q. Did you report that to either Mr. Darcy or whoever your superintendent was?

A. No, I did not.

Q. You did not, sir; and did you get orders from your superior to fill that? A. No.

Q. Or change that? A. No.

Q. And I believe you said you filled it yourself, did you not? A. No, I didn't say that.

Q. Oh, I misunderstood you, sir; then you didn't do any work on that? A. No.

(Testimony of Robert Monrad.)

Q. And you don't know whether any work was done on that by the Schaefer crew, do you?

A. No. I went by there a few days later and it was fixed and cribbed up, but I don't know who done it.

Q. Yes, sir, that's right. Now, then, what did you say about this structure at the top of the ground? Would you tell me that one again? What about that one? You said there was some structure at the top of the ground? [979]

A. Yes.

Q. What about it?

A. I said we had to make a fill, where the outlet was, and there's a set-off from one structure to another of three inches, and that was not done; it was flat clear across the two structures here.

Q. Now, did you do that work?

A. Yes, I dug that down.

Q. Did you do that under instructions from someone?

A. I done that from Fred—I don't remember his last name.

Q. Waltie? A. Yes, that's right.

Q. And did you give Mr. Waltie a statement of your time expended on that, sir?

A. No, but he was there all the time.

Q. Never mind the "but"; did you do it, sir?

A. No, I didn't.

Q. And you didn't make any determination of charge, yourself, at all? A. Oh, no.

Q. Did you keep a time book of your own?

A. No.

(Testimony of Robert Monrad.)

Q. Now, you started out for Mr. Macri to build panels at the job yard, correct?

A. That's right. [980]

Q. How many do you think you built for Mr. Macri? A. That I couldn't say.

Q. Well, I notice here that you told counsel that you worked there until you had 72 structures completed. That would be the necessary panels for 72 structures, would it not? A. Yes.

Q. Would those structures be identified to certain excavations, or not, or were they general?

A. Yes, they were built to certain substations or excavations.

Q. In other words, sir, you built those structures with respect to drawings of structures on the lay-out? A. Yes.

Q. In other words, you had a copy of the lay-out?

A. Well, my boss had. He gave me the dimensions.

Q. All right. Now, you've got two bosses; you had Macri first? A. Yes.

Q. You were working, in fact, under Mr. Staples, weren't you? A. Yes.

Q. He was your first boss? A. Yes.

Q. Then your next boss was who, Waltie?

A. No, my next boss was John Klugg.

Q. Yes; all right; then you changed from Staples to Klugg, [981] is that it? A. Yes, sir.

Q. Now, then, what I'm trying to find out is, did you start building structures off of these lay-



(Testimony of Robert Monrad.)

out drawings under the direction of Mr. Staples at the time?           A. No.

Q. Oh, who gave you the instructions?

A. John Klugg.

Q. Oh, Klugg was working for Macri, too?

A. Yes.

Q. Now, can you tell me whether or not the first forms you built were for the first structures on lateral 59.3, going forward on the stations?

A. On the first lateral is where we started.

Q. Yes?           A. Yes.

Q. Starting with structures numbered 1, 2, 3——           A. Yes.

Q. In other words, as long as you were working for Macri you built structures beginning with 1 and going on through?           A. Yes.

Q. Now, when you changed over from Macri employment to Schaefer employment, did you change the place of building structures, or did you go right on up? [982]

A. We went right on up the line.

Q. You built the panels for structures from numbers 1 to 72, inclusive, is that right?

A. That's right.

Q. On lateral 59.3?

A. I don't know the number of the place.

Q. Don't you know lateral 59.3?

A. I know the lateral, but I don't know the number of it.

Q. Well, the first lateral that the excavation was in, right?           A. Yes.



(Testimony of Robert Monrad.)

Q. Now, did you stay on forms until they began pouring concrete? A. Yes, sir.

Q. And you worked steadily building forms, Mr. Monrad; you just worked steadily building forms right along, did you?

A. Yes, in the yard; I didn't lose no time between the two.

Q. All right; they began pouring concrete on July 31, 1944, did they not? A. Yes.

Q. All right, so that you worked in building the panels for 72 forms? A. Yes.

Q. From the start of the job in March, 1944, until July 31, 1944, correct? [983] A. Yes.

Q. Did you receipt for lumber that came onto that job, into that job yard?

A. Which is it?

Q. Did you receipt for lumber, or did Mr. Klugg do that? A. No.

Q. In other words, you were just a carpenter?

A. I just done the work, what they told me, that's all.

Q. Your rating was a carpenter, was it not?

A. Yes.

Q. Not a carpenter foreman? A. No.

Q. All right, sir. You were not in the form constructing crew at all? You did not at any time work as part of the form constructing crew, did you?

A. Well, if I make the forms, that would be it, wouldn't it?

(Testimony of Robert Monrad.)

Q. No, that isn't what I mean. You make the panels, don't you?

A. Anything that belonged to the form, I make.

Q. In other words, you make the parts that go into the form? A. Yes.

Q. But you were not out in the field as part of the crew putting those panels together?

A. No.

Q. Now, you then would not have any way of knowing whether [984] the panels which you constructed were put together in a workmanlike manner unless you checked them after they were in the ground, would you?

A. No, not until after they were set.

Q. Then with respect to grouting, you spoke of grouting, grouting is a cement term, is it not, for the filling to put in there where there is any hole or interstice, and it is generally of a quality that will stick in there, and then you finish it off with a more nearly liquid type of cement on there, and then you put your sack on there and rub it, so it doesn't appear at all; that's what you mean?

A. Yes.

Q. And the she-bolt would have a couple of cones to pull out, and there would be a little cylinder in there that you would fill full of this concrete material, and then fill out to the hole and rub it clean, right? A. That's right.

Q. And you say you sometimes would have to hang over the structure to fix it? A. Yes.

Q. You did hang over the structure to fix it?

A. Yes.

(Testimony of Robert Monrad.)

Q. And you fixed it, did you?

A. Yes, I fixed it. [985]

Q. Did you make any statement of extra time required for that? A. No.

Q. And did you make any report of that to your superior?

A. Yes, I talked to him about it.

Q. Did he make any notation of that at the time, sir? A. That I couldn't say.

Q. Not in your presence, he did? A. No.

Q. All right, sir. You told counsel about the carpenters digging on the setting of forms ahead. There's been some testimony here, Mr. Monrad, that the forms were from 60 feet up to a quarter to a half mile apart; is that right, the structures?

A. I suppose sometimes they were.

Q. So if you saw them digging they would have to be within reasonable range, would they not, of your eyes? A. Yes.

Q. Is your eyesight good, sir?

A. Yes, I think so.

Q. You can see a quarter mile or a half mile?

A. Oh, I didn't try to look at them that far.

Q. Then the only work you saw was in the structures near together? A. Yes. [986]

Q. And on lateral 59.3 the structures weren't a half mile apart? A. I couldn't say.

Q. They were all within your sight, weren't they? A. I think so.

Q. And they were within sight where you could see the work progress right along?

(Testimony of Robert Monrad.)

A. That I couldn't say. You know, the ground rolls there. They might be down in a hole someplace.

Q. All right, sir. Now, I believe you told counsel that on the concrete work, that is, your finishing work—when the concrete was being poured into a structure were you there then? A. Yes.

Q. What was your function while the concrete was being poured?

A. Oh, I helped them tamp it and shovel it.

Q. Then your own work began after the concrete had been cured and the forms had been taken off, sir? A. No.

Q. I'm talking now about your concrete finishing work? A. Yes.

Q. And then you would do this grouting and finishing that I talked with you about, right?

A. Well, I started finishing after they filled the form with [987] green concrete, then my finishing began.

Q. Yes, sir, but you had nothing to do with checking the forms as to position and grade and so forth; that was not your function, was it?

A. No.

Q. And insofar as you aided in stripping forms, that was while you were standing by to finish, wasn't it? A. Yes.

Q. In other words, that was kind of an incidental employment, wasn't it, right?

A. Yes, I suppose so.

Q. Mr. Monrad, is it or is it not a fact that in field practice, now, with respect to panels for forms,

(Testimony of Robert Monrad.)

they are adaptable to be re-used, and are expected to be re-used, and are expected to be continuously used until they are past the place where they are no longer fit for forms, is that right or not?

A. Yes.

Q. So when you told counsel the forms had to go back to the job yard to be re-cut and re-shaped, that is normal function of a form builder, is it not?

A. No.

Q. Sir?

A. No, it is not. If the form isn't spoiled in any way you bring it ahead to the next hole that's got the same [988] dimensions.

Q. Oh, yes, but if there isn't another structure of the same dimensions within reasonable vicinity, you don't use that form again, do you, sir?

A. No.

Q. Now, if you take it ahead to an identical structure in size and shape so it would fit, you yet have to take the concrete off of it, don't you?

A. Well, there's no concrete on it.

Q. Don't you have to take the concrete off the veneer?

A. No, it wouldn't stick there, it was oiled.

Q. I understand it is oiled, but if there is any concrete deposited there, don't you have to remove it?

A. If it was.

Q. And if there is any break or defect you have to fix that?

A. Yes.

(Testimony of Robert Monrad.)

Q. If there is any wrecking of the panel you have to fix that up, and if there is any cracks or anything to be done you have to fix that?

A. Yes.

Q. Now, you don't go out on the job to do that, do you? The form is brought back to the job yard?

A. Yes.

Q. And that is a regular procedure, is it not?

A. That is with the broken forms, yes. [989]

Q. Yes, sir; now, is it or is it not a fact the lumber was wasted because under the sub-contract it provided that Mr. Macri should be the ultimate owner of it; did you throw lumber away?

Mr. Olson: Now, counsel's asked about three questions. If he's asking about the last question, if he threw lumber, I think that is proper, but if he asked if it isn't a fact that lumber was wasted because Macri was furnishing it, that's objected to.

Mr. Holman: I'll withdraw that.

The Court: Better ask the question again.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Isn't it a fact, Mr. Monrad, that you were given a great deal of latitude by Schaefer to discard lumber any time you wanted to?

A. It was not.

Q. What was your instruction from Schaefer with respect to lumber, and I mean by Schaefer, John Klugg or Mr. Darey or whoever was on there?

A. Use every bit of it that we could.



(Testimony of Robert Monrad.)

Q. And re-use it until it was finally exhausted?

A. Yes, sir.

Q. Now, was that done, sir?                      A. It was.

Q. Can you tell me how much lumber was used on that job? You [990] were there all the time.

A. No, sir, I couldn't. I didn't have nothing to do with that.

Q. Can you give me an estimate of it, from your experience?                      A. No, sir.

Q. You can't tell me the quantity at all?

A. No.

Q. And did you ever inquire?                      A. No.

Q. From Mr. Darcy or anyone?

A. No, sir.

Q. Did you ever make out a list of lumber required?                      A. No, sir.

Q. Did Mr. Klugg ever make it out in your presence, sir?                      A. No.

Q. And so far as you know there was no list furnished by you or by Mr. Klugg for any lumber?

A. No, I don't know that any was.

Mr. Holman: That's all, sir.

Mr. Hawkins: I have no questions, your Honor.

The Court: Any redirect?

Mr. Olson: Yes, I have a couple of questions here.

(Testimony of Robert Monrad.)

Redirect Examination

By Mr. Olson:

Q. Mr. Monrad, when I examined you as to setting forms out in the field, I understood you to tell me that you had [991] set a few of the panels and forms, the first part of the project, and again later on then I understood you to tell counsel that you had not worked in the field. Now, did you or did you not?

A. Well, I worked in the field when I set them, I think it was eight structures.

Q. Well, that's what I thought, you did assemble eight structures in the field?

A. Yes, with others.

Q. Now, counsel further asked you if you had worked steady in the yard assembling forms from March through July 31, and I understood you to say that you had.

A. Yes.

Q. Was there any period in there that you were off the job for any reason?

A. No, we was in the yard, we was repairing; the lumber was so bad that we built the forms and then it dried up and then I spent two weeks in the yard taking the new forms apart and pulling them together, tightening them up.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Holman: I have not, your Honor.

(Whereupon, there being no further questions, the witness was excused.) [992]

## ALLYN R. HUNTER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Olson:

Q. Your name is Allyn Hunter?

A. Allyn R. Hunter.

Q. Where do you live, Mr. Hunter?

A. In Portland, Oregon.

Q. What is your business, Mr. Hunter?

A. I'm in the insurance and bond business.

Q. And with what company?

A. I happen to own Rogers Insurance Agency.

Mr. Holman: Would you give me that?

(Whereupon, the reporter read the last previous answer.)

Q. You say you own it. Now, Mr. Hunter, had you had any bond connection with job 1062?

A. Yes, we wrote a bond for the Concrete Construction Company on 1062, Roza Project.

Q. On its sub-contract? A. Sub-contract.

Q. Now, Mr. Hunter, have you ever engaged in any other business [993] besides the bond business?

A. I spent about 17 years in the engineering and construction business before going into the insurance business.

Q. 17 years? A. Yes, sir.

Q. And are you a graduate engineer?

Q. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. Were you out on project 1062 during the course of its construction?           A. I was.

Q. And do you remember about the first time that you were on the project?

A. Along about the middle of June, 1944.

Q. Who did you go to the project with?

A. I drove from Portland to the project in my automobile. Mr. Schaefer and his superintendent, Fred——

Q. Waltie?

A. ——Waltie were with me.

Q. Now, did you meet anybody at the project?

A. We met Mr. Macri and his engineer or superintendent or whatever he was, Mr. Cohen, at the job office.

Q. What did you see when you got to the job office?

A. Forms, steel tied forms setting around. The shovel was there, broke down or being overhauled.

Q. Now, on the shovel, what do you mean? [994]

A. It was a hoe.

Q. You mean the big shovel for excavation, mechanical shovel?

A. Yes, sir; and we met Mr. Macri and Mr. Cohen there and had some discussion.

Q. Now, can you tell about how many panels were going on?

A. Very problematical; I would say in rough figures anywhere from 30 to 50; I might be away off on that, but there were considerable panels around there.

(Testimony of Allyn R. Hunter.)

Q. Now, Mr. Hunter, will you just go ahead and tell what took place, what was said, in Mr. Macri's presence?

A. Mr. Macri, Mr. Cohen, Mr. Schaefer, Fred Waltie, and myself went out on the project to look over some of the project, and Mr. Schaefer and Mr. Macri started in arguing right off the bat as to the structure excavation, so we drove out in the car; I couldn't give you the exact location. However, Mr. Waltie had a layout plan with him which I suggested he bring along. We went out and looked at maybe four or five structures that were in, and on both occasions Mr. Macri and Mr. Schaefer were arguing considerable about how tight they were, and there wasn't room, in my opinion, to put in forms properly.

Mr. Holman: I move that be stricken as not responsive, this last, your Honor. He's giving his opinion, and the rest, he's telling what happened.

The Court: Well, do you question his qualifications [995] as a construction engineer?

Mr. Holman: We might find that out later, your Honor; I don't know.

The Court: Well, I'll let it stand for the present. It's a question of opinion of an expert.

Witness (continuing): We walked on up and looked over several of the holes which had been dug, evidently by a hoe, and I would say that we looked at four or five holes over a matter of a half mile walking, or something like that. They were roughly excavated, and I got down in the hole with Mr.

(Testimony of Allyn R. Hunter.)

Waltie and measured up the approximate yardage in the hole, the distance out, and the length of it.

Q. And what you find?

A. And these holes were not long enough, they were not wide enough, for structures. As to their elevations in the bottom, there had been no work done, just the hoe teeth showed in there, and the soil was of such a nature that it could be excavated much wider to get your forms in properly.

Q. Were there on that day, or did you on that day check any excavations that the fine grading had been done in, or were there any?

A. Not as to the elevation in the bottom of the holes, no. I had no level or anything there to check the exact fine [996] grading in the bottom of the holes, which would require an instrument.

Q. Did you check and of the excavations for alignment?

A. Just from the hubs, yes.

Q. What did you find in the regard?

A. Well, I would say that it was a typical excavation of a hoe, without any hand work being done on the structure excavation.

Q. Now, did any conversation ensue there, Mr. Hunter, in Mr. Macri's presence?

A. Mr. Macri requested Mr. Schaefer to take over the fine grading, and Mr. Schaefer said "I will not have anything to do with the fine grading," and argument pursued; finally Mr. Schaefer told him that as soon as he got the fine grading on the button, that he would start out and put in his struc-



(Testimony of Allyn R. Hunter.)

tures, his forms, and pour his structures, and keep going, but he had to have enough of this ahead to keep him going, and Mr. Schaefer was very, very definite as to the structure excavation at that time being on the button.

Q. I'd just like to interrupt here; was there any work going on on the project at the time?

A. Not to my knowledge, there was nothing going on.

Q. Then proceed with the conversation.

A. So Mr. Macri said "Well, if you will get your men down in [997] the holes and take care of this additional work, I will pay you for it" and Mr. Schaefer said "I'll not do any of that work; that is not my job" and at that time Mr. Macri spoke up and said "If you will do any of this additional work here that necessitates any extra expense or cost to you I'll pay for it."

Mr. Hawkins: Your Honor, again I object to that testimony.

Mr. Holman: I join, your Honor, and move it be stricken.

The Court: The objection is on the same ground?

Mr. Hawkins: On the same ground, that it varies a written contract which expressly provides that no subsequent oral agreements can vary it.

The Court: Overruled.

Mr. Holman: May I have the witness's last statement?

(Whereupon, the reporter read the last previous answer.)

(Testimony of Allyn R. Hunter.)

A. (continuing): At that time Mr. Schaefer spoke up and said "I have not received any compensation for any extra work I have done on these holes up to date; I don't see where I can receive any from here on out, therefore I do not want anything to do with the structural excavation and fine grading" so we then left this particular [998] area and started back in the car, or walking back to the car, and Mr. Macri and I were talking together, in the presence of the other men, and Mr. Macri said "I will have Mr. Cohen on here the first of this next week to take over, and we'll see that this excavation is done properly"; and Mr. Cohen said that if he came out to handle that work, he would see that it was done properly. Mr. Schaefer said "Well, it remains to be seen what will happen between now and the first of next week."

Q. Now, out on the field at that time, were there some of the structures, by structures I mean the forms for the structures, in place?

A. There was.

Q. And what was the situation with reference to the banks, as to slope and as to clearance between the forms at the bottom?

A. There was no slopes, and the forms that were in in some cases were up against the vertical banks.

Q. Was there anything discussed in this discussion with Mr. Macri about the speed at which the job was progressing?

A. No, I can't recollect as to any discussion there.

(Testimony of Allyn R. Hunter.)

Q. When Mr. Macri testified or said he's paying for the costs, did he say anything about Mr. Schaefer writing him a notice each time that he did some excavating?

Mr. Holman: Just a moment. I object to that, [999] your Honor. The contract calls for that whether he says so or not.

Mr. Olson: I'm trying to find out whether that provision was in this contract.

Mr. Holman: What contract?

Mr. Olson: The one that they're just making out in the field.

The Court: I'll sustain the objection. He can say what was said in the field. I assume there wasn't any such provision. He can tell what the conversation was.

### Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15?

A. I think so. There was some discussion as to lumber, and there was a lot of discussion in Mr. Schaefer's behalf on account of the forms drying out, which they were, badly dried out.

Q. What was said about it?

A. Mr. Schaefer said "If we don't get to going here, I'm going to have to tear all the forms down

(Testimony of Allyn R. Hunter.)

and rebuild them, because they are shrinking and warping so bad that they will have to be worked on."

Q. Do you know about how many structures were ready for pouring [1000] at that time?

A. No, I couldn't say; there was probably a half a dozen that were in the ground, but I didn't go over enough of the area to say how many was in the ground.

Q. In your opinion, Mr. Hunter, how much pouring, that is, how many days' pouring, was there ready when you were there on June 15?

Mr. Holman: Just a minute. I object; he isn't shown qualified, your Honor.

Mr. Hawkins: My point is, in his opinion, how many were ready for pouring; that's a matter of fact, not opinion.

Mr. Olson: Is that what I asked?

The Court: I understood you asked how many forms were ready for pouring of concrete.

Mr. Hawkins: In his opinion.

The Court: In his opinion.

Mr. Olson: Would you read it, please, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I just submit he's not shown qualified, your Honor; just the statement he's an engineer doesn't qualify him.

Mr. Olson: I asked on construction work, and 17, years, he said. [1001]

(Testimony of Allyn R. Hunter.)

The Court: Perhaps you should show whether he's worked on concrete work or not. He might have been building bridges, and working in steel or wood.

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, Mr. Hunter, what has been your experience in this 17 years that you worked in your engineering?

A. I was with the Oregon State Highway Department three years, on various types of construction work, grading, surfacing, black top paving, concrete paving, head walls, bridge work. I then then was with the Bureau of Public Roads in a similar capacity as associate superintending engineer. I then went with Johnson D. Attley, building bridges in the State of Washington, up out of Deerie and Helmer, Idaho, and up out of Wilbur, Washington.

Q. Did you ever work on any irrigation projects, Mr. Hunter?

A. Yes, I was around the Owyhee Project; I estimated four jobs for Eck and Lind, contractors from Portland, Oregon.

Q. What kind of a project was that, those four projects for Eck and Lind?

A. They were similar to the Roza project.

Q. What did they consist of?

A. Drop boxes, head gates, tail gates, weirs.



(Testimony of Allyn R. Hunter.)

Q. And what material was to be put in them?

A. Concrete.

Q. And you say you estimated them; what do you mean by that? [1002]

A. Worked up the bids on these jobs.

Q. Now, in recent years, or when was this Eck and Lind job that you're talking about?

A. 1936 or '37.

Q. 1936 or 1937, and since that time, Mr. Hunter, what has been your connection with construction projects, if any?

A. I managed from 1942 to '45, I managed C. H. Wheeler Construction Company in all types of railroad, highway, airport, bridges, culverts, pipe, and everything else. I had sole management of about several million dollars worth of work.

Q. Did that include concrete work?

A. Considerable.

Q. Now, in connection with your insurance business that you're in now have you had any connection with projects, construction?

A. I've been out on various projects. I've been on the Roza Project with Nat McDougall Company's men.

Q. Now, Mr. Hunter, can you tell us in your opinion how many days', or if there was days' pouring, was there ready as far as structures completed and in the ground, when you were there June 15? Now, counsel wants to object.

Mr. Holman: Just a minute; I object to that question until he adds to the question the facilities for pouring. [1003]



(Testimony of Allyn R. Hunter.)

Mr. Hawkins: Then I think too, your Honor, this witness has testified that he did not see all the structures, therefore his testimony must be partly based on hearsay.

The Court: Well, I'll permit him to answer if he can. Overruled.

Witness: Your, Honor, I wouldn't say that I saw all the structures.

Q. Well, can you answer my question?

A. The structures I saw, there wasn't a half a day's pouring.

Mr. Hawkins: What was your answer again, sir?

A. Of the structures I saw, there wasn't a half a day's pouring. If there had been other forms in the ground out there I didn't see them.

Mr. Hawkins: I move to strike that, your Honor, as not responsive.

Mr. Holman: I'll join, your Honor. It shows the witness's observation and determination is limited to what he saw. He says he didn't see them all.

Mr. Olson: Your Honor, he's given the number of structures he saw. I've forgot what he said, but I'm sure it is in the record as to the number of structures he saw, and how long it would take to pour them.

The Court: I'll deny the motion to strike. It is understood, of course, he's not saying that that's [1004] all there were there. He testified there were 30 to 50 panels around—oh, no.

Mr. Olson: I think his testimony is in there someplace. I can ask him again to save time.

(Testimony of Allyn R. Hunter.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. How many structures did you see there, assembled in the excavations, when you were there on June 15?

A. Do you mean that were in the ground ready for concrete?

Q. Yes.

A. Around a half a dozen.

Mr. Olson: Your Honor, I have considerable more questioning of this witness.

The Court: Well, I'll recess, then, until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, March 4, 1947

1:30 P.M.

(All parties present as before, and the trial was resumed.)

Direct Examination  
ALLYN R. HUNTER  
(Continued)

By Mr. Olson:

Q. Mr. Hunter, at the time of adjournment we were discussing the conversation that took place between Mr. Macri and yourself and others out on

(Testimony of Allyn R. Hunter.)

the project about the middle of June, I think you said it was. Now, just what costs was it that Mr. Macri stated that he would pay for? [1005]

Mr. Holman: Object as having been already covered, your Honor. It is repetitious.

The Court: Well, I'll overrule the objection. I'm not sure that it was covered, what costs he said he would pay for.

Witness: Well, to get my mind on the thing now, Mr. Macri after the discussion, I should say between Mr. Macri and Mr. Schaefer, Mr. Macri brought up that he would take care of any additional expenses or costs pertaining to anything where the Concrete Construction Company was concerned.

Mr. Holman: I move that be stricken as a conclusion of the witness, your Honor.

The Court: I think it is a conclusion, and I'll grant the motion. He should say just the substance of the conversation as nearly as he remembers it, and not draw a conclusion.

Q. My question, Mr. Hunter, is what costs was it that Mr. Macri said he would pay for, and in answering the question, relate as nearly as you can the substance of the statement or statements made by Mr. Macri.

A. Pertaining to the——

Q. To the costs, the expenses.

A. Grading, structural excavation——

Mr. Holman: I object to the witness concluding [1006] what was said. He should state what he said.

(Testimony of Allyn R. Hunter.)

The Court: The question is what Mr. Macri said regarding his payment of the costs, as you remember the substance of the conversation.

Witness: Mr. Macri said "I'll take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you"; then Mr. Macri further said that "no man or sub-contractor has ever lost any money on Mr. Macri's job, and you're not going to be any exception."

Q. Now, when you were there on that date, Mr. Hunter, did you have an opportunity to and did you observe any lumber at the yard?

Mr. Holman: Object as having already been covered, your Honor.

Mr. Olson: Oh, no.

Mr. Holman: Oh, yes. He testified as to lumber.

The Court: I'm not sure that he did. I'll allow him to answer; overrule the objection. He talked about forms; I'm not sure about lumber.

Mr. Olson: Yes, forms and panels, but not as to lumber.

Witness: There was practically no lumber of any consequence——

Mr. Holman: I move that be stricken. [1007]

A. There was no lumber at the yard there that would be enough to make any additional panels, when I was there.

Mr. Holman: Your Honor, I move that be stricken as a conclusion of the witness.

The Court: Oh, I'll permit it to stand. He says very little or no lumber.

(Testimony of Allyn R. Hunter.)

Q. Now, when were you back on the job again, Mr. Hunter, if you were?

A. I was back on the job sometime during—oh, I would say after the 20th of August in 1944.

Q. And what did you see there at that time?

A. That was between 6 and 7 in the evening, as I remember it. Mr. Ratutan of the City Electric Company was with me. We had left Pasco and was on our way up over this job and to Portland. I went out. There was one of the Concrete Construction Company men, so he informed me, there on the job——

Mr. Holman: I move that be stricken, your Honor.

The Court: What somebody else told him will be stricken.

Q. Do you know who he was, Mr. Hunter?

A. I couldn't say, no.

Q. All right; now, what did you see there on that occasion about the 20th of August, 1944?

A. There were practically no forms, there were no forms to [1008] speak of, in the yard; some steel tied.

Q. How about form lumber?

A. It was about as it was the first time; there was, I would say, maybe a thousand or two feet of lumber in the yard.

Q. Do you remember, Mr. Hunter, whether or not there was—what types of lumber were there at that time?

A. I paid no particular attention to the lumber at that time.



(Testimony of Allyn R. Hunter.)

Q. Now, did you notice it as to quality?

A. No, I couldn't say as to the quality of it.

Q. Now, did you examine any of the excavations on that occasion?           A. No.

Q. You didn't go out on to the field?

A. It was too dusty. We started out, and come back.

Q. Now, were you on the job again during 1944?

A. I was through the job, oh, it was the latter part of September or first of October.

Q. And what did you observe on that occasion?

A. The day I was through the job, at that time there was no work going on; there was no men.

Q. Did you examine any of the excavations on that time?           A. No, sir.

Q. You just examined the excavations on this one occasion, then?           A. That's right. [1009]

Q. What in your opinion, Mr. Hunter, is a reasonable required excavation as far as lateral clearance is concerned, in order to install forms for and to remove forms for structures of the type that were to be installed on specifications 1062?

Mr. Holman: Just a minute; your Honor, I object to the question as an improper question propounded to this witness now as an expert. It should be based upon hypothesis which is supported by the evidence in the case preceding the witness's testimony, and his answer should be upon that, otherwise it is immaterial what he thinks, your Honor. If he's called as an expert he should give the answer to the hypothetical question.



(Testimony of Allyn R. Hunter.)

The Court: It isn't I understand it, a hypothetical question based on the evidence, but calls for his opinion as an expert engineer, as to what would be sufficient.

Mr. Holman: That, your Honor, I submit is irrelevant, immaterial, and outside the issues. If he's testifying as an expert it should be on a hypothetical question.

The Court: I think he could tell as an expert engineer what is a reasonable clearance in a structure of this kind. I'll overrule the objection.

Mr. Hawkins: I'd like to add that this witness [1010] has not been qualified to testify on this matter. There is no testimony he is a concrete engineer in any way, shape or form, or had any experience in this type of structure.

The Court: He testified he had considerable concrete experience, as I stated, and also figured on some reclamation structures.

Mr. Hawkins: Not this type.

The Court: Same general type. I think his lack of qualification would go to weight of the evidence rather than admissibility.

Mr. Holman: I would like to add to my objection that the question does not include within its scope the specifications for this job 1062, which are in evidence.

The Court: I thought it was your position that there are no specifications covering slope?

Mr. Holman: That is my position, except as specified.

(Testimony of Allyn R. Hunter.)

The Court: You say they're not specified, and if they're not, then it is a question of what is reasonable, regardless of specifications.

Mr. Holman: That's correct, your Honor, but so far as this witness is concerned, the question which does not include the specifications leaves him latitude beyond the Court, that is, asking him to substitute his [1011] judgment for the court's judgment.

The Court: I don't quite get your point yet, Mr. Holman.

Mr. Holman: My point, your Honor, my direct point, is that the only proper way to interrogate an expert witness is upon a hypothetical question, and the hypothetical question must have the elements which are involved in the litigation and before the court.

The Court: Well, I'll overrule the objection. Proceed.

Mr. Olson: Would you read the question?

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: I hate to keep interrupting, your Honor, but I object to that because the language used by counsel is not the language contained in the specifications. There is no testimony here whatsoever that the excavations were to be made according to the language that counsel has used, the exact language, which I think should be incorporated, is "the required excavation between vertical planes,"

(Testimony of Allyn R. Hunter.)

not what is reasonably necessary from the standpoint of the Concrete Construction Company. I think they're two different things.

The Court: Well, isn't it your position, Mr. Hawkins, that there is no required excavation here?

Mr. Hawkins: My position is, your Honor, that the specifications merely require the defendants Macri to excavate an excavation that is required for the structure.

The Court: All right, what is required? What is your position as to what is required?

Mr. Hawkins: Whatever——

The Court: Whatever is reasonable for that structure.

Mr. Hawkins: Whatever is reasonable for that structure, yes, that's right.

The Court: Well, if this man is an engineer and knows the structure, can't he say what is reasonable?

Mr. Hawkins: That gets back to the point I was about to make. There's been no testimony this man has familiarized himself with the structures required by the specifications, which of course are set forth in great detail, and there is no testimony that this man examined any more than a half a dozen of the structures in the excavation, and therefore I think it is improper for him to answer the question.

The Court: I think there might be some objection on that score. I think he said he went around and saw some of these forms in place, but you might

(Testimony of Allyn R. Hunter.)

interrogate—I'm not suggesting what you do, but it seems to me it might subject him to the objection that he hasn't shown [1013] himself to be sufficiently familiar with the type of structures to be installed in that area. I'll sustain the objection for that reason.

Mr. Olson: I was going on the assumption that he was familiar with the structures.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Hunter, did you examine, have you examined the specifications, including the structure layout plans, relating to specification 1062?

A. I did before the job was bid.

Q. And are you referring to plaintiff's Exhibit 12, and plaintiff's Exhibit 3?

A. This is 1062 here; yes.

Q. In what connection did you examine those specifications and the structure layout plan, Mr. Hunter?

A. Before Mr. Schaefer had turned in a bid on this project I stopped by his office in Portland, and we discussed it quite considerable one evening before he turned in this bid, as to the layout and structures, the grading, structural excavation.

Q. And did you or did you not have those structure layout plans with you when the trip was made to the job on June 15?

(Testimony of Allyn R. Hunter.)

A. Fred Waltie had them with him, and I went into them at that time with Mr. Schaefer and Mr. Maeri. [1014]

Q. Are you familiar, then, Mr. Hunter, in general with the structure layout plans and the general type of structures which were to be installed and which have now been installed on this 1062?

A. I feel that I am.

Q. Now, do you have in mind the question which I asked you previously about the lateral clearance? I'll re-ask the question. Mr. Hunter, having in mind, then, the structures that you saw, that is, the structure forms which you saw on the job 1062, and having in mind the structure layout plans, being plaintiff's Exhibit 12, and the specifications, being plaintiff's Exhibit 3, what in your opinion would be the reasonably required lateral clearance of the excavation from the structure to the bank in order to properly enable the installation of forms for these structures and the removal of the form panels after the installation or the pouring of the concrete?

A. Well, I would say, as has been said before, one foot out from the outside of the forms, and from a one to one or one and a half to one slope.

Q. And why do you say that, Mr. Hunter, and upon what do you base your opinion?

Mr. Hawkins: Just a moment; your Honor, I object to that. [1015]

Mr. Holman: It is a matter of cross-examination of an expert's answer, your Honor.



(Testimony of Allyn R. Hunter.)

The Court: Well, I think he may explain his answer. Overruled.

Witness: I think the excavation, structural excavation, has to be set out one foot from the outside of the forms to give your carpenters, your form setters, enough room to set their forms in and with enough slope to keep it from caving in, and making it easier for all around construction of the structures for the carpenters, so that they can expedite it.

Q. Now, is there any relation between the required lateral clearance and the removal of the panels?      A. There is.

Q. Will you explain that, Mr. Hunter?

A. If you don't have enough room on the outside, you wreck your panels, your forms, taking them out, and it takes considerable more time to get them out where you don't have room.

Q. Is there anything else about that, any other reasons you have, Mr. Hunter, for saying that that lateral clearance is reasonably required in the structures?

A. It is nothing more than good construction practice.

Q. Now, assuming, Mr. Hunter, that the excavations were made with a lateral clearance at the foundation of the [1016] structure of one foot, with a sloping bank of 1 to 1, and assuming further that the excavations were fine graded as to the floor of the excavation in such a manner as they are ready to receive concrete as called for by the structure



(Testimony of Allyn R. Hunter.)

layout plans, and assuming further that form lumber is available in proper quality and in proper time for the making of structure forms, and assuming further that the excavations are made and available in sufficient time to permit the person who is assembling the forms and installing the structural forms and pouring the concrete to proceed without interruption, what, in your opinion, would be the length of time reasonably required to complete the making of forms, the pouring of concrete, removal of the forms on the job referred to here, 1062, covered by plaintiff's Exhibit 3 and the structure layout plans, covered by plaintiff's Exhibit 12?

A. I made a statement to Mr. Schaefer——

Mr. Hawkins: Well, your Honor, I object to that as not responsive.

The Court: No.

A. I would say somewhere around 70 to 75 working days would have completed that project.

Q. Your answer is 70 to 75 working days. Now, Mr. Hunter, assuming that the excavations instead of being excavated in the manner described in my previous question, are [1017] excavated so that the walls or the banks are vertical, and so that the carpenters were required to do fine grading or hand excavation on the bottom of the excavations in order to form the floor of the excavation, so as to be ready to receive concrete, and assuming that the lateral clearance was lacking to the extent that the form panels, outside form panels, were flush with the banks, and in many instances the carpenters had to excavate the banks in order to place the strong-

(Testimony of Allyn R. Hunter.)

backs in place, and assuming that because of the lack of lateral clearance many of the form panels were damaged and had to be re-made, and assuming further that the excavations were not made sufficiently ahead of the carpenters to permit their continued operation without delay, and assuming further that the lumber furnished on the job was not furnished at such times as to permit the orderly completion of the forms, and assuming further that the same job, 1062, instead of being completed in your 70 to 75 working days, extended over a period of some twelve and a half months, having been commenced on March 13, 1944, and not completed until the following April 8 of the next year, 1945, what effect would that have, Mr. Hunter, on the cost of the work in completing this same structure work?

Mr. Hawkins: Your Honor, I certainly object to that question. I don't think this witness is qualified [1018] to testify as to costs. He hasn't been in the construction business for a long time and is not familiar with the costs as they existed at the time in question; furthermore, the question has not been embodied with proper exactitude all of the elements necessary for the determination of what the cost would have been; thirdly, on the ground that it is purely speculative. There is absolutely no way of telling what such costs would or might have been. It is uncertain and can only be guessed at at best, and the guess of this expert is certainly no better than the guess of myself or anyone else.

(Testimony of Allyn R. Hunter.)

Mr. Holman: And I would like to add that the hypothetical question did not state that notice had been given currently to the principal contractor of the sub-contract.

The Court: Is the purpose of this question one that will elicit a qualitative or quantitative answer? Are you asking what effect it would have to increase the cost, or do you intend to bring out the dollar and cents amount that it would increase it?

Mr. Olson: I do not expect this witness to reply with a dollar and cents answer, your Honor. As a matter of fact, I would be astounded if he does. I simply want to show the effect.

The Court: Well, I'll overrule the objection, if [1019] it is merely to be a qualitative answer.

Q. Do you have in mind the question, Mr. Hunter? A. Part of it, at least.

Q. If there is any question about it I would like to have the reporter read it. If you have it in mind proceed.

A. If I can answer it in this way; the time element alone I would think would make it two or three times more than it would be if the job could have carried through.

Mr. Hawkins: Your Honor, I move that be stricken. That is certainly a quantitative answer. He can state that it might increase the cost, or would have.

The Court: I think that is different. I take that to mean that it would increase greatly, the matter of delay. I'll overrule the objection.

(Testimony of Allyn R. Hunter.)

Mr. Holman: I would like to move that the answer be stricken, your Honor, as one prohibited by the terms of the contract in evidence, and therefore immaterial.

The Court: I'll deny the motion to strike. Now, let's see, he's answered so far as to the matter of time delay. Did I understand the answer correctly, that he's testified as to what the effect of delay would be?

Mr. Olson: Yes, the time alone, he said.

The Court: That's right.

Q. Now, would you proceed, Mr. Hunter, with answering the balance of my question, if you have it in mind? [1020]

A. Well, I think that I would say as I said before, that two or three times as much as the original expected cost would be.

Mr. Hawkins: I again object to that, your Honor, and move that the answer be stricken, because it is a definite mathematical answer, twice the cost, which these people will later be able to show. I don't think that is proper at all. He can testify that it would increase the cost, but how could he tell from the facts enumerated in this question whether it would increase the cost half as much, 25 per cent, 50 per cent, 200 per cent? He hasn't stated how many days the carpenters were delayed, how many structures were involved, what the cost of materials were at that time, and so on. Now, it seems to me that the elements in the question make it impossible for this witness to make a state-

(Testimony of Allyn R. Hunter.)

ment of that kind, based solely upon the elements in the question. I think without any shadow of a doubt the witness is calling upon his memory of what the job looked like at the time he was there, when he gives this testimony. I don't think he's confining himself to the elements mentioned by counsel at all. If he were, it would be impossible to say two or three times.

The Court: I'm assuming he's confining himself to the elements of the question, but I will grant the motion [1021] to strike two or three times. It doesn't seem to me it would be possible to make a definite opinion statement as to what the increased costs were.

Mr. Olson: Your Honor, isn't that a matter for counsel to go into in cross-examination? I intend, your Honor, to show what our actual costs were on this job, as I stated once before, by a certified public accountant. Now, it seems to me I'm entitled to substantiate their actual figures with expert testimony that the costs would be increased in that approximate amount by this delay and the extended time, the manner of excavation, and those things I mentioned in my hypothetical question. When you say "two or three times" certainly that's not putting your finger on a certain dollar, but there are certain elements considered and certain limits within which an expert witness can encompass the cost.

The Court: I thought he said two times, this last time.



(Testimony of Allyn R. Hunter.)

Mr. Olson: If he did, I didn't catch it.

Mr. Hawkins: I thought he said two or three, if I remember correctly, but in this case that is a variation of about \$50,000.00.

Mr. Olson: No, it isn't.

Mr. Hawkins: Well, it is a variation of a substantial sum, at any rate, your Honor. How can anyone [1022] give an answer of that kind based upon the question that counsel has just put to the witness? It is humanly impossible for one to look at that hypothetical question alone and say that it would increase the cost two times, or three times.

The Court: Well, I'll strike the answer. I think he may say whether it increases it substantially, or greatly, or something of that sort, but not a definite amount.

Mr. Hawkins: It would depend upon the extent of the delay, and the extent of lack of materials, and all the rest of it, which hasn't been testified to in any way, shape or form as yet.

Q. Mr. Hunter, having in mind, then, the hypothetical question which I propounded to you last, state whether, or how, that would affect the cost of performance of the preparation of the forms and their installation in the excavations.

Mr. Holman: Same objection previously registered.

Mr. Hawkins: There's been no testimony in this record whatsoever as to the extent of delay, the extent of lack of materials, as to the delay with respect to the respective structures erected out there. I don't think there's been any evidence on



(Testimony of Allyn R. Hunter.)

which counsel could base a hypothetical question.

The Court: Not detailed, but a good deal of general evidence.

Mr. Hawkins: There's been evidence that the lumber has been delayed, but there is no evidence from which anyone could arrive at any figures.

The Court: I'll overrule the objection.

Mr. Olson: I wasn't through with the question, your Honor.

(Whereupon, the reporter read the last previous question.)

Q. (Continuing): the pouring of concrete in the forms, and removal of the forms after the concrete was poured.

Mr. Holman: The objection continues, your Honor. Same objection.

The Court: Yes, the record will show that the objection stands to this question the same as made to the prior one.

Mr. Holman: I would like to add now that it is also prolix, this question; it asks for several different things, it asks for at least three or four answers, your Honor.

The Court: Well, he's asking how it would increase the cost. He may answer.

Witness: In the first place, it would increase your labor cost immediately. You have your equipment rentals, [1024] your fixed overhead, your general delay——

Mr. Ivy: What was that last?

A. ——general delay; interest.

(Testimony of Allyn R. Hunter.)

Mr. Holman: That's interest on money?

A. On money.

Q. Are you able to state, Mr. Hunter——

Mr. Holman: Now, your Honor, I move that the answer be stricken as not responsive to the question.

The Court: Overruled—denied, rather; it's a motion to strike.

Q. Are you able to state, Mr. Hunter, in view of your education as an engineer, and your experience which you have related in the record, within the confines of some limits the numbers of times that the cost would be increased by virtue of the matters set forth in the second hypothetical question which I propounded a while ago?

Mr. Hawkins: I object to that, your Honor please, for the reasons already stated. There isn't a single item specified in any of the questions counsel has asked from which he can determine any figure. Now, maybe all these delays that counsel speaks of, and all this lack of material, is insufficient to cause any actual delay. So far as we know all the workmen Schaefer had on the job were busy all the time. There isn't a bit of evidence to the contrary. It's true his carpenters were digging when [1025] they should have been building forms, but there is no evidence whatsoever that they were idle. I think the question is improper for those reasons.

The Court: Mr. Olson?

Mr. Olson: Of course, when counsel says that there is no evidence of any delay on this job, I'm

(Testimony of Allyn R. Hunter.)

truly astounded. The testimony is, your Honor, that for five weeks our men were pulled off of the job. The testimony is further that they went out there to put in these structures, and they had to start excavating, and that from March 13 until 'way into April, the first excavation that was ready for putting in structures was on April 15, and even then when they were notified it was ready, it wasn't ready; that they kept on working, and got down to May 19, and their progress was so slow, they had been doing so much digging, that they pulled off of this job and were off of it until the 29th of July, and they said because there was no excavations ready. Their testimony is, your Honor, that they continuously had to wait for lumber in the yard, that the carpenters when they came up on these holes, they weren't ready, and instead of going ahead and doing their form work they had to do this excavating. Their testimony is further that in taking out these panels, instead of being able to move them down to the next excavation, they had to take them back to the yard [1026] and remake them; that the fine graders in many instances were working in the same holes, that they had to get them to come back to do this fine grading with the carpenters at the holes. The testimony is, your Honor, that had these things been done as they should have been done, this job could have been performed in four months, 70 to 75 days by this witness; other witnesses say four months. Now, how counsel can say that there is no evidence, your Honor, of any delay, I don't understand.